Jany 23 – argued – W. Ironsides Esq
Mr Goodrich 11.15
Jany 26 W. Strayne

SUPREME COURT OF THE UNITED STATES.

No. ~~200.~~ 116.

ALBERT E. GOODRICH AND GEORGE C. DREW, APPELLANTS,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 200.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. David Davis, one of the justices of the Supreme Court of the United States, presiding, and the Hon. Thomas Drummond, district judge of said district, associate judges of said circuit court, on Friday, the fifteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

WM. H. BRADLEY, *Clerk.*

ALBERT E. GOODRICH AND GEORGE C. DREW
vs.
THE CITY OF CHICAGO.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered, that on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-three, the city of Chicago, by B. F. Ayer, esq'r., its proctor, filed in the office of the clerk of the circuit court of the United States of America, at Chicago, in said district, its
2 transcript of a record from the district court of the United States for the northern district of Illinois in admiralty; which said transcript is in the words and figures following, to wit:

Pleas in the district court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of said court, and on Wednesday, the thirtieth day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth year.

WM. H. BRADLEY, *Clerk.*

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
CITY OF CHICAGO. } Libel.

Be it remembered, that on the nineteenth day of October, in the year of our Lord one thousand eight hundred and sixty-one, said libellants, by Goodwin, Larned & Goodwin, their proctors, came into the clerk's office of the district court of the United States for the northern district of Illinois, and filed their stipulation for costs, and also their libel, and sued out a writ of citation against said respondent, all of which are in the words and
3 figures following, to wit:

Stipulation for costs.

District court, October term, 1861.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Whereas a libel was filed in this court on the nineteenth day of October, A. D. 1861, by Albert E. Goodrich and George C. Drew, against the city of Chicago, in a cause of damage, civil and maritime, for the reasons and causes in the said libel mentioned, and praying that a monition may issue against the defendant and the said libellants and surety, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety, execution may issue against their goods, chattels, and lands for the sum two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall pay all such costs as shall be awarded against them by this court, or in case of appeal, by the appellate court.

ALBERT E. GOODRICH.
GEORGE C. DREW,
4 By A. E. GOODRICH.
A. WALLINGFORD.

Taken and acknowledged this 19th day of October, A. D. 1861, before me.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

A. Wallingford, party to the above stipulation, being duly sworn, depose and say that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all his debts.

A. WALLINGFORD.

Sworn this 19th day of October, A. D. 1861, before me.

D. GOODWIN, JR., *United States Com'r.*

Endorsed: Filed Oct. 19, A. D. 1861.

WM. H. BRADLEY, *Cl'k.*

Libel.

To the Honorable Thomas Drummond, judge of the district court of the United States within and for the northern district of Illinois:

The libel of Albert E. Goodrich and George C. Drew, who were at the time of the damage hereinafter mentioned owners of the steamboat Huron, both of the city of Chicago, in said district, against the city of Chicago,
5 defendant, in a cause of damage, civil and maritime, alleges as follows:

First. That libellants are the owners of the steamboat Huron, a vessel of more than 20 tons burthen and duly enrolled and licensed at the port of Chicago, and used in navigating the waters of lakes and rivers connecting said lakes, and engaged in the business of commerce and navigation thereupon.

Second. That before and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, there was, and from thence hitherto hath been and still is, a certain common and public navigable river in the said district, and within the admiralty jurisdiction of this court, called the Chicago River or Harbor, for all persons to pass or repass by boats, steamboats, barges, and vessels, at their free will and pleasure, subject to such regulations as the city of Chicago might or may impose. That before the time of committing the grievance hereinafter mentioned, the said defendant was and is possessed of the exclusive jurisdiction, care, management, and control of the said river and harbor, by an act of the legislature of the State of Illinois, approved May 14, 1851, whereby the defendant was authorized and empowered, amongst other things, to remove and prevent all obstructions in the water which are public highways in said city, and to widen, straighten, and deepen the same, and to collect such taxes and pass such ordi-
6 nances as shall be needful to carry said power into effect, and were authorized and empowered to preserve said harbor and to prevent any use of the same tending in any degree to fill up or obstruct the same, and to prevent or remove all obstructions therein, and to punish the authors thereof, and to regulate and prescribe by such ordinances or through their

harbor master or other authorized officer such use of the said harbor as might be necessary to promote the safety of all boats, vessels, or craft navigating the same, and to impose penalties for offences against such ordinances, which said harbor of the said city, it was declared by said act, should include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake, and the Chicago River and its branches to their respective sources. That the said defendant as such corporation accepted the said act of legislature, and have ever since assumed and exercised the exclusive care, management, jurisdiction, and control over the said Chicago Harbor so defined as aforesaid, and from the date of the said act have levied and collected taxes and assessments upon the tax-payers of said city, for the purpose of discharging their said duties so imposed and accepted as aforesaid,

7 and have passed the necessary ordinances therefor and appointed a harbor master and other agents to superintend the same.

That in pursuance of such powers and in fulfilment of said accepted duty the said defendant did afterwards and on or about the twentieth day of May, A. D. 1856, pass an ordinance for the removal without delay of any obstruction to the free navigation of said harbor, wherein, amongst other things, it was ordained that "whenever there shall be in the harbor any vessel, craft, or float insecurely fastened, adrift, sunken, or laid up, not in use, and which may require to be be fastened, raised, removed, or its location changed, it shall be the duty of the harbor master or his assistants to notify the owner, master, or other person who may be in charge thereof to secure, raise, or remove such vessel, craft, or float without delay, but if the habor master or his assistants shall be unable to find the master, owner, or person in charge of such vessel, craft, or float as aforesaid, or if no person answering such description can be found by him or them, such notice shall not be required." And the libellants say that the Chicago River and Harbor is a public highway in said city to the ends of the north and south piers and into Lake Michigan, and that by means of the premises it was the duty of the

8 defendant to remove or cause to be removed all obstructions to the free and safe navigation of said river and harbor. And said libellants allege that in consequence thereof the defendants on the day of April, 1856, appointed one William A. Ingles, harbor master of said Chicago Harbor, under said ordinance, who, at the time of the damage hereinafter mentioned, was harbor master as aforesaid, vested with full control and management of said harbor, and it was his duty as agent of the said defendant to remove all such obstructions to the free and safe navigation of said harbor.

Third. That on the first day of November, A. D. 1856, a certain vessel, being a schooner called or known as the McKay or James McKay, became and was sunk in said Chicago Harbor, at or near the mouth of the Chicago River, and inside of the north pier, so called, became an obstruction to the free and safe navigation of the Chicago River and Harbor, and that in pursuance of their said power and duty aforesaid, the said defendant assumed the exclusive right to remove the same, and did by their harbor master aforesaid undertake and commence the removal of the said sunken wreck or hulk by hitching thereto a steam-tug, called the McQueen, and thereby attempting to raise and remove the same as they of right ought to do and in truth and fact were bound to do, but they did not complete the work nor

9 raise and remove the said sunken wreck or hulk as they had exclusively assumed and undertaken to do, but worked on the said sunken vessel, endeavoring to raise the same and pulled several pieces of timber from said vessel in the attempt to raise and remove her, but without raising or removing the same, the said defendant did as the libellants verily believe and therefore allege, loosen the said wreck or sunken vessel in its bed, and then left the same and negligently and carelessly left

the said sunker vessel for a long time, to wit, until the twenty-ninth day of March, A. D. 1859, by means whereof, during the time aforesaid the said wreck by the action of the winds and currents of the waters became drifted further into the channel of said river, the space of forty feet, and during all the time aforesaid was kept in the channel of said river by the defendant under water so the same could not be seen and without fixing or placing any buoy, float, mark, or other signal at or near said obstruction to denote that the same was so there or give notice thereof to the public or to said plaintiffs, although the defendant well knew that the said sunken wreck was there and beneath the water.

Fourth. That in consequence of the negligence of said defendant, on the day and year aforesaid, a certain steamboat, the property of said
10 libellants, and called the Huron, of the value of $25,000, with her cargo, engine, machinery, and furniture, then and there going through the said Chicago River, her owners and master being ignorant of the locality and position of said sunken vessel, or that there was any sunken wreck in the said river, was accidentally and without any fault, negligence, misconduct, or want of care and skill on the part of the libellants or their agents in the management of the said steamboat, run upon and against the said obstruction and wreck and was greatly damaged and injured thereby, and was, with her cargo, engines, machinery, tackle, and furniture, immediately thereafter sunk, and the said libellants were thereby deprived of the use of said steamboat for the space of seventy-four days, and were obliged to expend and did expend the sum of eleven thousand five hundred eighty-seven and 50-100 dollars in and about the raising and repairing of their said steamboat; and the said libellants were deprived of the gains and profits which said steamboat could and would have earned but for said damage and injury, which demurrage for said seventy-four days would, as libellants believe and allege, have amounted to the sum of one hundred dollars per day, amounting to the sum of $7,400, over and above all just deductions. And libellants were further injured in the loss of their iron safe and their tools which were on board of said steamboat, being of the value
11 of five hundred dollars, and which were wholly lost to said libellants.

Fifth. That an account of said damages, injuries, demurrage, and losses was made and presented to said defendant on or about the fifteenth day of September, 1857, a copy of which is hereto annexed, marked Schedule A, and made a part of this libel, but that said defendant has neglected and refused to pay the same, and that there is not due and unpaid from defendant to said libellants the sum of nineteen thousand four hundred eighty-seven 50-100 dollars, together with interest on the same from the fifteenth day of September, 1857, aforesaid.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Whereupon the libellants pray that process in due form of law according to the course of this honorable court in cause of admiralty and maritime jurisdiction may issue against said defendant, and that said defendant be cited to appear and answer upon oath all and singular the matters aforesaid, and that the said defendant be decreed to pay to the said libellants the amount of damages incurred by them as aforesaid, together with the interest to the time of the final decree in this court or any appellate court and the costs, and that the libellants may have such other and further relief in the
12 premises as in law and justice they may be entitled to receive.

ALBERT E. GOODRICH.

Sworn this 19th day of October, A. D. 1861, before me.

D. GOODWIN, JR., *United States Commissioner.*

SCHEDULE A.

The city of Chicago to Albert E. Goodrich and George Drew:

1857, Sept. 15. To amount of damages to steamboat Huron as per appraisers' estimate furnished you herewith.....	$8,439 00
To expenses raising steamboat Huron from bed of river.....	3,148 50
To demurrage for 74 days loss of time of steamboat Huron....	7,400 00
To loss of iron safe and tools	500 00
	19,487 50

Endorsed: Filed Oct. 19, 1861.

WM. H. BRADLEY, *Clk.*

Citation.

THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas a libel has been filed in the district court of the United
13 States in and for the northern district of Illinois, on the nineteenth day of October, in the year of our Lord one thousand eight hundred and sixty-one, by Albert E. Goodrich and George C. Drew, who were owners of the steamboat Huron against the city of Chicago, in a certain action, civil and military, therein alleged to be due to said libellant amounting to the sum of nineteen thousand four hundred eighty-seven and 50-100 dollars and interest, and praying that a citation may issue against the said defendant, pursuant to the rules and practice of this court: Now, therefore, we do hereby empower and strictly charge you, the said marshal, that you cite the city of Chicago, if it shall be found in your district, that it be and appear before the district court on the first Monday in November next, at the court-room, in the city of Chicago, then and there to answer said libel and to make its allegations in that behalf, and have you then and there this writ with your return thereon.

Witness the Hon. Thomas Drummond, judge of the said court, at Chicago, in the northern district of Illinois, the nineteenth day of October, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-sixth.

[L. S.] WM. H. BRADLEY, *Clerk.*

14 *Marshal's return.*

Executed the within writ by reading to and in the hearing and presence of Julius Rumsey, the mayor of the city of Chicago, and also by delivering to him a true copy thereof this 19th day of October, A. D. 1861.

J. R. JONES,
U. S. Marshal N. District Illinois,
By P. MUNSON, *Deputy.*

Endorsed: Filed Oct. 24, 1863.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 30th day of November, A. D. 1861, the said respondent came and filed its answer in the office of the clerk of said court in the words and figures following, to wit:

Respondent's answer.

To the Honorable Thomas Drummond, judge of the district court of the United States for the northern district of Illinois:

The answer and exceptions of the city of Chicago, the defendant, to the libel of Albert E. Goodrich and George C. Drew, libellants.

And now comes the said city of Chicago and for answer to the said libel doth allege and propound as follows, to wit:

First. That it is entirely ignorant of the matters in the first article of the said libel alleged.

15 Second. That this honorable court has no jurisdiction of the matters contained in the said libel, the same not being matters of admiralty and maritime jurisdiction, the said libel being filed in this court to recover damages for an injury alleged to have been occasioned by the neglect of the respondent to remove an obstruction to the navigation of the Chicago River and Harbor. The duty of removing the said obstructions not being one imposed or implied by the maritime law, but one implied, if at all, from the principles of the common law and the special legislation of the State of Illinois, and this respondent prays the same advantage thereof as if the same were separately and formally pleaded to said libel.

Third. That the libellants are barred and precluded from having or maintaining their said libel because the same supposed grievances and causes of action in the said libel mentioned have been heretofore passed upon and adjudicated in an action at law commenced by the said libellants against this respondent in the circuit court of the county of Cook, in the State of Illinois, at the October term of said court, in the year of our Lord one thousand eight hundred and fifty-seven, in which action judgment was after-

16 wards rendered by said court in favor of the said defendant, and the said judgment was afterwards, upon appeal taken to the supreme court of the State of Illinois, at the April term of said court, A. D. 1858, duly affirmed by said supreme court, and the same still remains in full force and effect. And this respondent insists that the judgment rendered in the above-mentioned action is a complete bar to this suit, and it prays the same advantage thereof as if the same were separately and formally pleaded to said libel.

Fourth. (Withdrawn by stipulation.)

Fifth. That this respondent admits that the said Chicago River is a public highway within the said district for all persons to pass and repass by boats, steamboats, and other vessels, at their free will and pleasure, subject to such reasonable regulations as the city of Chicago may, under the authority derived from the legislature of the State of Illinois, lawfully impose. The respondent, further answering, says that the charter of the city of Chicago granted by the legislature of the State of Illinois and approved February 14th, A. D. 1851, provides for the election or appointment of one or

17 more harbor masters, whose duty it shall be "to enforce all ordinances and provisions of said act in relation to the harbor." It also provided in said act that the common council of said city shall "have power within the jurisdiction of the city, by ordinance. * Second to remove and prevent all obstructions in the waters which are public highways in said city and to widen, straighten, and deepen the same." "Fifty-third. To preserve the harbor to prevent any use of the same, or any act in relation thereto, inconsistent with or detrimental to the public health or calculated to render the waters of the same, or any part thereof, impure or offensive or tending in any degree to fill up or obstruct the same; to prevent and punish the casting or depositing therein any earth, ashes, or other substances,

filth, logs, or floating matter; to prevent and remove all obstructions therein and to punish the authors thereof; to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and streets of the city by steamboats, canal-boats, and other crafts and vessels, and the disposition of the sails, yards, anchors, and appurtenances thereof while entering, leaving, or abiding in the harbor, and to regulate and prescribe by such ordinances, or through their
18 harbor master, or other authorized officer, such a location of every canal-boat, steamboat, or other craft or vessel or float, and such changes of stations in and use of the harbor as may be necessary to promote order therein and the safety and equal convenience, as near as may be, of all such boats, vessels, crafts, and floats, and may impose penalties not exceeding one hundred dollars for any offence against any such ordinance, and by such ordinance change such penalties, together with such expenses, as may be incurred by the city in enforcing this section upon the steamboat, canal-boat, or other vessel, craft, or float. The harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake and the Chicago River and its branches to their respective sources." And this respondent avers that it has never possessed any further jurisdiction or control over the said Chicago River and Harbor and has never been charged with any further duty respecting the same than are conferred and imposed by the foregoing provisions of its said charter.

Sixth. That the said charter of the city of Chicago was imposed
19 upon said city by the legislature, and was never submitted to the inhabitants of said city for their approval or acceptance. And this respondent denies that it has ever assumed, or undertaken to exercise, or that it was bound to exercise, all the authority over the said harbor as defined by the said charter, which is by said act conferred. And it also denies that it has from the date of said act levied and collected taxes and assessments for the purpose of performing the acts so authorized by its said charter, and avers that the power of taxation conferred by said charter is utterly inadequate to the exercise of any authority so extensive and which would obviously involve such extraordinary expenditures.

Seventh. That the respondent admits that on or about the twentieth day of May, A. D. 1856, the common council of said city of Chicago passed an ordinance entitled "An ordinance concerning the harbor." And this respondent, for greater certainty as to the particular provisions thereof, begs leave to refer to the said ordinance when the same shall be produced. The respondent further admits that one William A. Ingles was duly appointed harbor master of said city of Chicago on the fourteenth day of April, A. D. 1856, and that he continued to hold said office for the term of one year after his said appointment; but this respondent denies that the said city of
20 Chicago was under any legal obligation to remove or cause to be removed all obstructions to the free and safe navigation of said river and harbor as is in said libel alleged, or that the neglect of the harbor master to remove such obstructions would expose said city to any legal liability to the said libellants or any other party.

Eighth. That this respondent admits that on or about the first day of November, A. D. 1856, a certain schooner, called the McKay, or James McKay, was sunk in said Chicago Harbor at or near the mouth of the river and inside the north pier, so called. And this respondent further saith that said vessel was sunk there accidentally, at a spot about twenty feet distant from said north pier and in water at that time about eight or nine feet deep, and that said accident was not occasioned by any fault or negligence of said city of Chicago, nor was said city in any way interested in said vessel or responsible for its management; that the spot where the said ves-

sel sunk was some sixty or seventy feet distant from the channel where vessels usually passed, and entirely out of the way which loaded vessels were obliged to take both in entering and leaving the said harbor. This respondent therefore denies that the said sunken vessel was an obstruction to the safe navigation of the said Chicago River and Harbor, as is in said libel alleged.

21 Ninth. That this respondent denies that it assumed the exclusive right to remove the said sunken vessel, but it is true that after said vessel had been apparently abandoned by her master and owners the said harbor master made an unsuccessful attempt to remove said wreck by hitching thereto a steam-tug. And this respondent further saith it is untrue that several pieces of timber were pulled out from said vessel in the attempt made by said harbor master to remove her, nor is it true that the said harbor master succeeded in loosening said vessel in its bed; but the truth is that said vessel was so firmly and deeply imbedded in the sand at the bottom of said river that he was unable with the means then at his command to move or loosen her at all, and was therefore obliged to desist from his said attempt. This respondent, further answering, denies that said wreck afterwards became drifted further into the channel of said river, but, on the contrary thereof, avers that the said wreck remained in the same spot where it had sunk all through the next ensuing winter and up to and until after the accident to the said steamboat Huron complained of in said libel, and that during the entire period aforesaid a portion of the said wreck remained above water and plainly visible to all who had occasion to navigate the said river and harbor, thereby obviating the necessity of placing any buoy or other

22 signal at or near the said wreck and rendering such a precaution entirely useless.

Tenth. That this respondent denies that the injury to the said steamboat Huron in the said libel mentioned is at all attributable to the negligence or default of this respondent, or that this respondent was under any legal obligation to remove the said sunken vessel, and it also denies that the master and owner of said steamboat were fully apprised of the position of said wreck, and that the injury to the said steamboat was occasioned by the carelessness, negligence, and unskilfulness of the master, officers, and crew in charge of the said steamboats, and that they alone are responsible for the damages sustained by the said libellants.

Eleventh. That this respondent has no knowledge respecting the amount expended in repairing the said steamboat or the other damages occasioned by the accident and injury complained of in said libel, and it therefore leaves the said libellants to make such proof thereof as they may be able and advised to produce.

23 Twelfth. That all and singular the premises are true. Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise law and justice to administer in the premises.

JULIAN S. RUMSEY, *Mayor.* [SEAL.]
SAMUEL D. WARD, *City Comptroller.*

Attest: A. J. MARBLE, *City Clerk.*
B. F. AYER, *Proctor for Def't.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Samuel D. Ward, being duly sworn, deposes and says that he is comptroller of the city of Chicago, and as such officer has supervision over all legal or other proceedings in which the interests of the city are involved; that he has heard the foregoing answer read and knows the contents thereof, and

that the same is true according to the best of his knowledge, information, and belief.

SAMUEL D. WARD, *City Comptroller.*

Sworn to before me this 29th day of Nov., A. D. 1861.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Nov. 30, 1861.

WM. H. BRADLEY, *Clk.*

24 And afterwards, to wit, on the 17th day of January, A. D. 1863, being of the December term of said court for the year A. D. 1862, in the record of the proceedings of said court in said cause is the following entry, to wit:

ALBERT E. GOODRICH *et al.*
v.
CITY OF CHICAGO. } Libel.

Now come the parties by their proctors, and thereupon this cause is set down for hearing on the libel, answer, and proofs on file, and after progressing in the trial until the hour of adjournment, the further hearing is postponed until Monday morning.

And afterwards, to wit, on Monday, the 19th day of January, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

ALBERT E. GOODRICH *et al.*
v.
CITY OF CHICAGO. } Libel.

Now come again the parties by their proctors, and the court after hearing the conclusion of the evidence and a part of the argument of advocates until the hour of adjournment having arrived, the further hearing is
25 postponed until to-morrow morning.

And afterwards, to wit, on Tuesday, the 20th day of January, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

ALBERT E. GOODRICH *et al.*
v.
CITY OF CHICAGO. } Libel.

Now come again the parties by their proctors, and the court after hearing the concluding arguments of advocates, not being sufficiently advised of the matters herein, take said cause under advisement.

Libellants' proof.

The deposition of Sanford W. Morgan, taken on the fourth day of December A. D. 1861, before O. K. A. Hutchinson, commissioner.

First. What is your name, age, occupation, and place of residence?

Ans. My name is Sanford W. Morgan; I am thirty-eight years old; I am captain of a steamboat; I have been sailing on the lakes for twenty-
26 seven years; I reside in Sheboygan, Wisconsin; my general occupation is that of a mariner.

Second. Do you know the libellants in this cause, Goodrich and Drew?

Ans. Yes, sir.

(Mr. Ayer, proctor for respondent, now appears and objects to the taking of the deposition of the witness, on the ground of interest.)

Third. Have you any interest in this suit?

Ans. No, sir.

Fourth. Do you know who were the owners of the steamer Huron in '57?

(Objected to, on the ground there is better evidence.)

Ans. Yes, Drew and Goodrich.

Fifth. Were you master of the Huron that year?

Ans. Yes.

Sixth. When did you commence sailing that year?

Ans. It was about the 20th of March we left here.

27 Seventh. Where did you go?

Ans. I went to Two Rivers. We returned here the 27th of March, about three o'clock in the afternoon.

Eighth. Did you prepare to go out again?

Ans. Yes, we started out about eight o'clock from Hugunin's dock, near where the sugar refinery now stands, on the north pier. We backed down from there. She lay so near the mouth of the river was the reason we backed down instead of turning round to go out; while she was backing out she struck the wreck of the schooner James McKay, knocked a hole in her aft about the quarter of the length from her stern on the starboard side. She sunk in about fifteen or twenty minutes.

Ninth. Had you ever seen or known of the wreck at any time before?

Ans. No, sir.

Tenth. Was any portion of her visible above the water?

Ans. No, sir.

Eleventh. Describe the situation of the hulk or wreck.

28 (Proctor for libellants now produces Map G, No. 38, hereto attached and marked Exhibit A.)

Ans. The stern of the wreck lay about ten or twelve feet from the north pier, near the spot I have indicated on the map at the angle of the north pier. Her bow lay headed about southwest, eighty or ninety feet from the north pier, from a quarter to a third of the way across the river or somewhere about there. The next day after the accident I sounded all around the wreck and over it and found from ten to twelve feet of water where she laid and found somewhere about four feet or four feet and a half over her stern. Her stern lay about four feet and a half under water. All the top of the wreck had washed away except her stern. There was nothing left there of her but her bottom except her stern. There was about six and a half feet over the balance of the wreck. enough for the steamer Huron to have passed over.

Twelfth. State the size of the stem.

Ans. I should think it was from ten to twelve inches square It was probably ten or twelve inches one way and fourteen or fifteen the other.

29 Thirteenth. In what position was the stern situated?

Ans. She had what is called a raking stern, slanting up the river and pointing southward.

Fourteenth. Do you know what became of the wreck after this accident?

Ans. It was hauled up close to the pier, cut in two, and towed away by a man named Packard.

Fifteenth. How did he do it?

Ans. He got it out by rigging purchases on the pier, and got it near enough the top of the water to cut in two, and tugs towed it away.

Sixteenth. Do you know of his attempting to do it in any other way?

Ans. Tugs were hitched to it before it was raised, and they tried to haul it away.

Sixteenth. State if you know why Mr. Packard removed it, and for whom.

Ans. The reason he moved it, I suppose, was because he got pay
30 for it. He was hired to move it. He was hired by the city to move it.

Seventeenth. Do you know of Mr. Packard removing any other wreck for the city from the harbor?

(Objected to.)

Ans. No, sir.

Eighteenth. After this accident did you see any other vessel run on to this wreck?

(Objected to.)

Ans. Yes, sir. Within a week after I saw two or three vessels run on to the wreck. I don't know that they suffered any damage. These vessels were coming into the harbor, and when they struck it they glided off without injuring them.

Nineteenth. State, if you know, how soon after the accident any buoy was placed over the wreck, and by whom.

(Objected to.)

Ans. Somewhere about a week after the accident a buoy was placed over the wreck. I believe it was placed there by the harbor master, Fuller.

Twentieth. How large a boat was the Huron?

Ans. She was three hundred and forty-eight tons, I think.

31 Twenty-first. Had she a cargo and passengers on board?

Ans. Yes; the passengers got off on to the pier. Some of the cargo we got off on to the pier, and some of it was washed overboard. About one third of it was lost, and the balance was saved in a damaged condition.

Twenty-second. Was the Huron properly manned, equipped, and her signal lights brightly burning, and proper look-outs on deck?

(Objected to.)

Ans. Yes.

Cross-examination by B. F. Ayer, esq., proctor for respondents.

First. How were you employed during the season 1856?

Ans. I was employed as captain on the schooner Charlotte. In the fore part of the season she was engaged in the lumber trade between Chicago, Milwaukee, and Two Rivers and Racine. In the latter part of the season, in the grain trade from Milwaukee to Oswego, and Milwaukee and Two Rivers.

Second. Did you enter Chicago Harbor after the first of November during that season?

32 Ans. No, sir. Not after the first of July.

Third. Were you ever master of a steamboat on the lakes prior to 1857?

Ans. No.

Fourth. At what time did navigation commence in 1857?

Ans. We left here about the 20th of March, and she was about the first steamboat that went out. The Prairie State went out before we did.

Fifth. How old a boat was the Huron at that time?

Ans. Either four or five years old.

Sixth. In what trade was she engaged in 1856, and who commanded her?

Ans. Capt. Goodrich, I think, one of the libellants, commanded her in 1856. She was engaged in the Milwaukee and Two Rivers trade that year.

Seventh. Where was she laid up that winter?

Ans. In Chicago.

33 Eighth. At what time was she laid up?

Ans. I was not here when she was laid up, and don't know what time.

Ninth. Did Capt. Goodrich reside at Chicago at that time?

Ans. I don't know where his house was.

Tenth. Were either of the libellants on board the Huron at the time of the accident you have mentioned?

Ans. No.

Eleventh. Was it before or after dark when you left Hugunin's dock that night?

Ans. After dark.

Twelfth. What was the distance from the dock to the spot where the accident occurred?

Ans. About eight or nine hundred feet.

Thirteenth. Did you have any lines out while backing down the river, or on what did you depend for guiding the boat?

34 Ans. We did not have any lines out. We always depend on the rudder to steer the boat.

Fourteenth. Had you begun to turn the boat at the time the accident occurred?

Ans. We were backing her straight down the river or nearly so. She was slewing towards the north pier, so as to give her a chance to turn when she got out far enough.

Fifteenth. On what part of the boat where you when she struck?

Ans. On the pilot-house?

Sixteenth. Who was acting as pilot at the time?

Ans. The captain or mate always acts as pilot, and gives directions to the wheelsman. In this instance I stood near the wheelsman and gave the necessary directions. I don't know who the wheelsman was.

Seventeenth. Who were the other officers on the boat?

Ans. The mate's name was White.

25 Eighteenth. Do you know whether he had sailed from Chicago the season before, or how he was employed?

Ans. I don't.

Nineteenth. What look-outs did you have on the steamboat that evening while you were backing down the river?

Ans. I was a look-out myself. I was forward and the mate was aft.

Twentieth. State the nature of the injury occasioned by the collision.

Ans. It knocked a hole through her bottom about sixteen inches one way and about a foot the other.

Twenty-first. Did the Huron sink alongside of the sunken hulk, or did you move her away from it before she went down?

Ans. We got her up alongside of the dock, about one hundred and fifty feet from where she struck, before she sunk. When we got her alongside of the dock she was half full of water. She drew so much water that we could not get her up close to the dock, but got her within eight or ten feet.

36 *Redirect examination.*

First. If there had been a buoy over the wreck, or you had known the wreck was there, would it have been difficult for you to have backed out and avoided it?

Ans. If I had known it was there, I could have avoided it in backing out as in heading out. If there had been a buoy there in the day time, when I came in, I should have known she was there and could have avoided her in going out at night.

S. W. MORGAN.

Subscribed and sworn to before me this 4th day of December, A. D. 1861.

O. K. A. HUTCHINSON,
U. S. Commissioner.

37 ALBERT E. GOODRICH AND GEORGE DREW
vs.
THE CITY OF CHICAGO.

Depositions of Wm. A. Ingles, Henry Fuller, Henry White, John Prindiville, L. C. Hugunin, Stephen Clement, John F. Stafford, Nathaniel S. Bonton, John B. Warren, and Charles Harding, taken before O. K. A. Hutchinson, esq., a commissioner of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, on behalf of the libellants, on the fourteenth day of January, 1862, and subsequent thereto.

Deposition of Wm. A. Ingles.

1st. What is your name, age, occupation, and place of residence?

Ans. My name is Wm. A. Ingles. I am 42 years of age. I reside in Chicago. My occupation is that of a sailor.

2d. Were you appointed harbor master of the city of Chicago 1856 to continue such till your successor was appointed and qualified?

38 Ans. Yes.

3d. Did you qualify and assume the office?

Ans. I did.

4th. Were you furnished by the city with an ordinance defining your duties?

Ans. There were posters, containing copies of the ordinances relating to the port of Chicago, furnished me.

6th. State in general terms what your duties were as harbor master of the port of Chicago.

(Objected to by proctor for respondent, for the reason that his duties were defined by the charter and ordinances of the city, which are the only competent evidence.)

Ans. My duties were various. I had to remove vessels at the request of the owners of the docks, to remove obstructions in the river and branches, and to prevent the throwing filth into the river.

6th. What salary did you receive from the city?

39 Ans. At the rate of fifteen hundred dollars a year.

7th. Who paid the expenses for removing wrecks and obstructions from the river?

(Objected to by proctor for respondents.)

Ans. It was my duty to notify the owners, if they could be found. If not, the wrecks were removed at the expense of the city.

8th. Was the season of navigation in the year 1856 a busy one?

Ans. Yes, very.

9th. Did you, or not, remove many wrecks from the river that season?

(Objected to.)

Ans. Yes; several.

10th. State all you remember.

(Objected to.)

Ans. The bottom of the steamboat Oregon was removed at the expense of the city; also two canal-boats. That is all that I removed, I think.

40 11th. Do you remember the obstruction at the mouth of the river of the schooner McKay?

Ans. Yes, sir.

12th. Did you attempt to remove her?

Ans. I did.

13th. State the time and mode, in general terms, what you did in attempting to remove her.

Ans. I employed the tug McQueen, Capt. John Prindiville, in November, 1856, to go and try to tow her out. We hitched on to her with a hawser on to one of her timber heads first, I think, but will not be positive as to that point, and tore it out; then we hitched on to the stern, and parted the hawser; we again hitched on, and parted the hawser the second time; then abandoned trying in any more.

14. What hawser was it?

Ans. I think it was a hawser about one third worn.

15. State, as near as you can, where the McKay lay.

Ans. I think she was lying about thirty-eight feet from the north
41 pier; her keel was about that distance from the pier. She lay just outside of the line of the south pier, near where the first angle is in the north pier. The distance from where she lay to the end of the north pier, I should think, was seven or eight hundred feet; perhaps less; never measured it.

16. Which end of her was up stream?

Ans. The stern was up stream. She lay nearly east-northeast, west-southwest.

17. How deep was the water over her? State how she lay.

Ans. She lay on the port side, canted towards the north pier; her port side was under water, and a portion of her starboard side was out of water, about a foot above water; a portion of her stanchions were out of water, and starboard rail, I think; what there was of the rail on the starboard side must have been out of water. Her stern-post was under water, except a small piece of it which came above the deck. There was not enough of the stern-post above water to hitch on to.

42 18. Was there anything between the wreck and the north pier?

Ans. There was not at the time that we undertook to remove her. When she sunk there was a vessel moored inside. It was a large vessel, I should think twenty-five and a half or twenty-six feet beam. I don't know in what depth of water she sank.

19. Was the channel deeper between her and the pier than it was where she lay?

Ans. It must have been deeper, because she careened over to port—over toward the pier.

20. Could a loaded vessel have lain between her and the pier?

Ans. A vessel drawing eight or nine feet of water could have lain there very comfortably.

21. Could you have removed the wreck on the day when you tried?

Ans. I could not on that day.

22. Could you have done so immediately after?

43 Ans. I could have removed her after that, on any still day, with proper material to work with. I could have done it by scows at her sides, and getting chains under her with blocking and timber and screws, raising her up two feet, would have been high enough to have raised her so as to have towed her out.

23. How much would it have cost the city to have done this?

(Objected to.)

Ans. Not to exceed one hundred and fifty dollars.

24. How long would it have taken to have removed her?

Ans. Two or three days good weather; perhaps not so long.

25. When was your successor appointed?

Ans. Somewhere about the middle of March, I think.

26. While you were still harbor master were you frequently on the pier in the spring of 1857?

Ans. I was.

27. Did you see anything of this wreck in the spring?

44 Ans. No, sir.

28. Was any signal put over her by the city to indicate where she was?

Ans. Not that I know of; I should have seen it if there had been.

29. In the position in which you have described the wreck in the fall of 1856, with her stern raking west-southwest thirty-eight feet from the pier, and the vessel heading east-northeast, would or would not the action of the water and ice coming down the river in the spring have a tendency to work out her stern farther from the pier toward the middle of the river?

Ans. The ice would have no effect on the vessel, but it is my impression that the current would have a tendency to slue her stern out into the river. If there was any portion of the wreck above water the ice would have the same tendency, but there was no portion of her above water when the ice went out in the spring.

45 *Cross-examination by B. F. Ayer, esq., proctor for respondents.*

1 c. int'y. Where and how was the schooner McKay wrecked? Who were the owners of the vessel, and what steps were taken by you when you were first apprised of the casualty?

Ans. She was wrecked about the 20th of November. I think she was wrecked by pounding against another vessel. The owners' names were Parks & Finnigan, St. Joseph, Michigan. I notified them in writing to remove the vessel. They attempted to remove her, but did not succeed. They got chains under her, and it came on to blow again, and they stripped her of her sails and rigging and abandoned her.

2 c. int. Was it before or after the owners had thus abandoned her that you undertook to remove her as you have stated above?

Ans. It was after they abandoned her.

3 c. int. Did you receive any directions from the mayor or other city official in reference to her removal?

(Objected to by proctor for libellant.)

Ans. I did not.

46 4 c. int'y. How long had the McKay been sunk when you tried to remove her?

Ans. Ten or twelve days, I should think.

5 c. int. How long was it before the close of navigation that season?

Ans. It could not have been but a few days.

6th c. int. Do you remember what time navigation closed that year?

Ans. I don't know whether it closed on the 7th or 9th of December. It was in that neighborhood.

7th c. int'y. Did any portion of the vessel remain above water until after the close of navigation? If so, what portion?

Ans. The stern and, I think, the end of two or three stanchions remained above water.

8th c. int'y. State whether you made any impression on the McKay when you attempted to haul her away.

Ans. Not any that could be noticed.

9 c. int'y. Was she not at that time imbedded in the sand at the bottom of the river?

47 Ans. Yes, I have no doubt but that she was.

10th c. int'y. Did you leave her in the same position she was in before you tried to remove her?

Ans. Yes, I did.

11 c. int'y. How far did she lay at that time from the channel of the route which vessels usually took in entering and going out of the harbor?

(Objected to.)

Ans. Some vessels might go within ten feet of her and others a hundred feet from her. She was fifty or sixty feet from the middle of the river. It was all considered channel where she lay.

12 c. int'y. Did not loaded vessels, in entering the harbor and going out, always give the spot where she sank a wide berth in consequence of shallow water at that point?

Ans. They generally took the middle of the river as near as possible. It used to be shoal water on that point. A great many men were not aware that it had not been dug out.

13th c. int'y. Did the depth of water exceed nine feet where the McKay sank?

48 Ans. I never measured it. It is my impression that there was eight or nine feet.

14th int'y. Was it necessary to place any buoy or signal over the McKay that fall, or was the wreck visible to all who had occasion to pass near it?

Ans. I did not think it was necessary. There was a portion of her stern and stanchions out of water. It would have been necessary in the spring.

15 c. int'y. At what time did the wreck cease to be visible above water?

Ans. I could not tell. Some time during the winter. I never paid any attention to it after navigation closed.

16 c. int'y. When was navigation resumed the next spring?

Ans. In April some time, as a general thing, but on this lake in March. The straits were not usually open till April, and were not that year. My successor was appointed and qualified about the middle of March. About that time some few wood vessels went in and out. The steamboat Huron made one trip about that time.

49 17 c. int'y. Was not the stem of the McKay visible above water that spring, and have you not so stated before this and given that as a reason for not placing any signal over the wreck?

(Objected to, for the reason that the witness's attention is not called to the particular time and place.)

Ans. I think there was no portion of the wreck above water in the spring to the best of my recollection. I have not stated that the stern was above water in the spring according to my best recollection.

18 c. int'y. Did you know who were the owners and commander of the steamboat Huron in 1857?

Ans. I do not know who were the owners from my own personal knowledge; only from general report. Capt. Morgan was her commander.

19 int'y. Do you know anything respecting the accident to the Huron in March, 1857, and the circumstances attending it?

Ans. I did not see the collision, and do not know of any the circumstances attending it only from report.

50 20 c. int'y. Do you know whether Capt. Morgan or either of the libellants in this suit were apprised of the position of the McKay before the accident? State all you know respecting their opportunity to acquire information on that subject.

(Objected to.)

Ans. From my own knowledge I don't know that they were apprised of the position of the wreck. It was generally known that the wreck was then in that position. Capt. Morgan had made one trip that spring before the accident. I saw Goodrich & Drew here occasionally during the winter. I saw Mr. Drew here occasionally during the fall, in the street. I don't know that I saw him more than once in ten years on the north side.

21 c. int'y. Do you know whether Goodrich & Drew are connected with or interested in any other boats which ran from Chicago that spring?

Ans. No, only by general report. They acted in the capacity of agents

for other boats. They acted as agents for Clement's line of steamboats. There were three boats, I think. I am only guessing at it.

51 (All the above answer is objected to by proctor for libellant.)

22 c. int'y. When you attempted to remove the wreck of the McKay, in November, 1856, did you succeed in loosing her in her bed, or in changing her position at all?

Ans. I did not, not that could be noticed.

23 c. int'y. Did you or not discontinue your efforts because they had no apparent effect upon the wreck?

Ans. Yes; we abandoned it because it was useless to stay there.

Redirect examination.

1st. Did not the McKay lay in that part of the river or channel often used by vessels entering or going out of Chicago Harbor drawing seven or eight or nine feet of water?

Ans. Yes, sir; she did. The whole harbor is used by vessels of that class.

2nd. Was there not room enough and water deep enough for vessels of unusual size to pass between the McKay and the north pier?

52 Ans. There was water enough no doubt, but it would be rather risky for a vessel to undertake to go between the pier and the wreck in tow of a tug.

3d. Could or could not a vessel warp through easily?

Ans. Yes, a vessel could warp through. She would go so slow there would be no danger of injuring the vessel.

4th. State whether or not a steamboat of 24 feet width of beam, drawing seven feet of water, could have gone through between the McKay and the pier.

I think not. I think a tug could.

WM. A. INGLES.

JANUARY 23d, 1862.

Deposition of Henry Fuller.

1st. What is your name, age, and place of residence?

Ans. My name is Henry Fuller. Reside in Chicago. I am 54 years of age.

53 2nd. Were you harbor master of the city of Chicago in 1857?

Ans. Yes, sir.

3d. When did you qualify and assume the office?

Ans. The last of March or the first of April. It was previous to the time when the Huron ran on the McKay.

4th. When did you first know of the wreck being there?

Ans. It was in the spring that I first knew of the wreck being there. I saw Finnigan here some time after the accident—it must have been in April or May—the owner of the McKay, who lived at St. Joseph, Michigan, and notified him to remove it, or he would have to pay for moving it, and I think his answer was that he had nothing to do with it. I told him that the city would have to do it, and charge it to him. Some time after the accident I went down to the wreck of the McKay, and was sounding around there to see if it could be got out. They were raising the Huron, and it must have been soon after the accident that I went down to her. No part of the McKay was above water. I think she lay with the bow down the stream and in

54 a diagonal direction across the river; it might have been seventy or a hundred feet from the north pier—that is, her bow. I should think her deck was four or five feet under water. No buoy or signal had been placed

over her to my knowledge. I think there was a signal placed over her afterwards. The matter was taken out of my hands and the city superintendant took charge of the matter afterwards. [It properly belonged to the harbor master to get out wrecks. I don't know what a harbor master is for, if not to get out wrecks and keep the river clear.]

(Proctor for respondent objected to the testimony of the witness included in brackets.)

5th. Do you know of the wreck being removed subsequently by the city, under a contract with Capt. Packard?

Ans. All I know about it Capt. Packard told me he had got a contract to remove all obstructions in the river, and that was one of them. There was a deputy harbor master under me, appointed by the city—by the the mayor and confirmed by the council; name was Leonard Hugunin. I did not know of the wreck's being there till after the accident. I don't know of any notice having been given by the city of the wreck.

55 HENRY FULLER.

Deposition of Henry White.

1st. What is your name, age, residence, and occupation?

Ans. My name is Henry White. I am 30 years of age; am a sailor, and reside in Chicago.

2nd. Were you mate of the Huron in the year 1857?

Ans. I was.

3rd. Did you go in and out of the harbor here the fall previous?

Ans. Yes, on the steamer Cleveland. I was second mate.

4th. Did you see the schooner McKay laying as a wreck in the river during the fall?

Ans. I did. She laid headed northwest, with her stern southwest. I think it was late in the season.

5th. How early in the spring did you go out?

Ans. About the 15th of March. I think we were gone three days on
56 the first trip. We ran on to the McKay on the second trip going out. This was the last of March. I don't recollect the day. It was about seven o'clock in the evening. It was a fine night. We had a light load. We drew about 5½ or 6 feet of water. We started from James Hugunin's dock; Capt. Morgan was sailing her at the time. He was master of her at the time; he was on the pilot-house. At the time of the accident I was standing on the upper deck aft as a look-out. We backed down the river to go out. We were backing very slow. I called out to the captain all clear aft; he had just rung the bell to back more, and at the same time she struck.

4th. State whether it was customary or not for steamboats to back out of the river.

(Objected to.)

Ans. It was customary when boats had not room to turn round without going above the bridge.

7th. State whether or not there was at that time room enough to turn round.

There was not room at that time.

57 8th. State whether or not a steamer can back out that distance, as well as to go out headforemost, as to safety.

Ans. Yes, sir, she can.

7th. State whether or not during that spring you had known or heard of the wreck being there.

Ans. I heard nothing about it till after the accident, and then I heard several vessel captains say they supposed it had been removed. I did not know it was there in the spring.

HENRY WHITE.

Deposition of John Prindiville.

1st. What is your name, age, occupation, and place of residence?

Ans. My name is John Prindiville. I am thirty-seven. I am a mariner by profession. I reside in Chicago.

2nd. Do you know the libellant?

Ans. Yes, sir.

58 3d. Were you master of the tug McQueen in the fall of '56?

Ans. Yes, sir.

4th. Do you know Capt. Ingles, the then harbor master of the city?

Ans. Yes.

5th. State whether you were employed by him to attempt to remove the wreck of the schooner McKay from the harbor of Chicago. If yea, the time and circumstances.

Yes, sir. I was employed by him, the harbor master. It was either the latter part of November or the first part of December, 1856. Most of the fall I had been at Mackinaw wrecking. I went down to the north pier at the mouth of the river, and found the wreck of the McKay. She lay southeast and northwest; her stem, I think, heading northwest. I am not positive, but think her stem was heading northwest. She was fully fifteen feet and may have been thirty from the *the* pier. I was to the eastward of her
59 and could not tell the exact distances. The southeast end of her, I should think, lay in about fourteen feet of water. The other end lay, it might have been, ten or eleven feet deep. The deck was about even with the surface of the water. The rail and stanchions on the east side of the wreck were gone. Her southeast end was a little above, and her northeast end was a foot or two above the water; I think it was fully two feet or more. She laid about square on her bottom. She was not twisted over any that I could see. Ingles got on the wreck; he made the hawser fast to a portion of the wreck, and pulled at it, and pulled the piece that it was fast to out of her. I told him that I did not think there was any use in pulling at her with the hawser that we had. It was only a six-inch hawser that he had, and partly worn at that, and there was no use in jerking with that hawser, because it would not bear a jerk. I think that I told Ingles that if he got a heavy hawser, a ten-inch hawser, that we would pull her out of there or pull her to pieces; that there was no use pulling at her with what he had got. The best of my recollection is, that we told Ingles that it was only throwing money away to keep the boat there pulling at her with what we
60 had. We charged ten dollars an hour for the boat. We pulled at her three or four times, and parted the hawser once, the other times pulled some pieces out of her. The hawser was not fit to pull with, and we did not use more than a quarter of the power of the boat at any time. I don't know what pieces we pulled out of her. It was some pieces that we hitched the hawser to; it might have been her deck beams, but I don't know. I don't think we did move her any. I could not see that her position was changed at all.

6th. Where did you spend the ensuing winter?

Ans. I spent the winter in Chicago, and in the latter part of March, the 28th or 29th, I went off.

7th. State whether the position of the wreck had been changed during the winter.

Ans. I think it was changed in the forepart of December, in a heavy gale of wind from the southeast. The wreck seemed to have been swung round by that gale more athwart the channel, so that she headed almost north and south. In a southeast gale we have a heavy easterly sea running in
61 towards the harbor.

8th. State whether you saw the wreck early in the spring following.

Ans. There was a stick sticking up about a foot out of water about where the wreck was, but I could not say whether it was a part of the wreck or not. There are frequently parts of the old pier washing away in heavy gales of wind, and drifting about there they look like parts of a wreck.

9th. State whether or not, during the spring of 1857, it was generally known to the sailing community that there was a wreck in the harbor there, and how it lay.

Ans. It was not generally known unless to lumber vessels trading in and out of here in the spring. It could not have been by other vessels, by the sailing community, unless advertised, and I did not see any advertisement.

Cross-examination by B. F. Ayer, esq.

1st c. int'y. At what time did the navigation close in the year 1856?

Ans. It was pretty well along in December. We consider navigation closed on the 30th of November at noon, when all marine risks cease. There are some vessels run after that if not prevented by ice.

62

2 c. int'y. Do you know when and how the McKay was wrecked?

Ans. She was wrecked that fall, the fall of 1856, but I don't know the time when or how; I was away at that time.

3d c. int'y. Must not the fact of there being a wreck there have been known to all persons entering the harbor that fall?

Ans. I suppose of course to all vessels entering the harbor after it happened.

4th c. int'y. At what time in the spring of 1857 was navigation resumed, and at what time generally is navigation resumed in the spring?

Ans. It is resumed in the spring by vessels that are not insured as soon as the ice permits. By other vessels not before the first of April, as insurance does not commence till that time. In the spring of 1857 navigation commenced early in March.

63

5th c. int'y. Did you take any particular notice of the position of the wreck after the attempt made by you with the McQueen to remove it?

Ans. Yes, sir. When I was coming into the harbor, in a heavy south-east gale of wind that I have before mentioned, that was four or five days perhaps after I tried to get the wreck out of the way, I saw that her position was changed. She lay more athwart the channel and further out in the river. Her stem and stern were still out of water; I could see her deck flush with the water; she was a small vessel; I should think about 100 feet long from stem to stern.

6th c. int'y. How long did that gale last? And state as near as you can the severity of the gale.

Ans. It lasted about 16 hours. It was not a very severe gale, because it was clear weather, and not freezing or snowing. There was a heavy sea, about as heavy as we generally get with the wind from that quarter.

7th c. int'y. How long were you engaged with the McQueen in attempting to remove the wreck?

64

Ans. I can't exactly tell now; it might have been an hour and a half or three hours, I don't know which.

8th c. int'y. What did you intend to do with the wreck when you commenced operations?

Ans. My intention was to pull her out of the way when there would be no danger of vessels running on to her. We designed to tow her down alongside the breakwater, or around the north pier on to the beach.

9th c. int'y. State, if you know, what finally became of the wreck.

Ans. She was taken out of there; I think by Packard. It was in the summer of 1857. She was raised up by chains and derricks, and towed away.

10th c. int'y. Do you think that the efforts you made loosened the vessel at all?

Ans. I don't think they did; we could not make any efforts with the hawser that we had that amounted to anything.

11th c. int'y. When you left her did you leave her in any more dangerous position than you found her in?

65 Ans. No.

Redirect examination.

1st. State whether, at the time you pulled at her, there was any sand in the wreck.

Ans. I could not tell whether there was or not, but I judge from the length of the time she had been there there could not have been much, if any. The whole of the wreck lay on hard sand.

2nd. State whether or not the whole river between the piers is navigable for vessels of seven or eight feet draft, and one part of it as safe as another.

Ans. Yes, it was. From pier to pier there is thirteen feet of water; all over that is between the piers. Beyond the end of the south pier there is over thirteen feet of water in the channel; the channel is there about two hundred feet wide; at the knuckle of the north pier there is shoaler water about ten feet deep. The McKay lay just to the eastward of the knuckle; anywhere around there it is safe for vessels of eight feet draught.

66 *Recross-examination.*

1st. Have you any doubt that the position of the wreck would have been changed by the gale you have mentioned if you had made no previous attempt to remove the wreck? Did the efforts you made, in your opinion, contribute in any degree to the subsequent change in her position?

Ans. I have no doubt but the gale would have changed the position of the wreck if we had not touched it. The efforts which we made to remove it, in my opinion, did not contribute in any degree to the subsequent change in her position.

JOHN PRINDIVILLE.

JANUARY 29th, 1862.

Deposition of L. C. Hugunin.

1st. What is your name, age, occupation, and place of residence?

Ans. My name L. C. Hugunin. I am 50 years of age and upwards. My occupation is that of deputy inspector of customs. I reside in Chicago.

67 2. Were you deputy harbor master in 1857?

Ans. I was, under Mr. Fuller.

3d. State what you know concerning the sunken wreck McKay, and the sinking of the steamer Huron during that year.

Ans. I know that there was a wreck of an old vessel laying in the jaws of the harbor, that obstructed the passage somewhat. I know nothing about the steamboat Huron having been sunk by striking that wreck, or from what cause whe was sunk; I know she was sunk in that vicinity. I first knew of the wreck of the McKay in the spring before the accident, I think.

4th. State whether you visited the wreck after the accident, and if so, the place where and the position in which you found her.

Ans. I did visit the wreck after the accident, and sounded around her. I should think her stern was about five feet from the north pier, and her head laid nearly thwartships of the stream, perhaps a little more east than thwartships.

68 5. State how much water there was over her.

Ans. There was very little water over her stern-post, perhaps not over a foot when I examined it. Over her stern there was perhaps ten feet of water; her stern laid out.

6th. Do you mean her deck?

Ans. She had no deck; her deck was entirely gone.

7th. What kind of bottom did she lay in?

Ans. Sand.

8th. How long after the accident was this?

Ans. A week, perhaps more, I don't know.

9th. What subsequently became of the wreck?

Ans. She was raised and sawed into three pieces thwart ships, and towed out of the channel, perhaps half way down to the round house on the lake shore, and there dropped.

10th. State, if you know, who did it, who paid for it, and the expense of doing it.

69 Ans. Packard & Co. removed the wreck; I don't know who paid for it.

11th. State, if you know, who employed Packard.

Ans. I don't know.

12th. Did Packard & Co. state to you how much they got for removing the wreck?

(Question objected to, on the ground that it is incompetent and hearsay testimony.)

Ans. I am not sure that Packard told me; it may have been some of his people; I got the impression that they were to get fifteen hundred dollars for removing her.

Cross-examination by J. W. Buell, esq.

1 c. int. State as nearly as you can the width of the river or harbor where the wreck lay.

Ans. I would think it did not vary far from two hundred feet.

2 c. int. Was there sufficient room for vessels to pass and repass without coming in contact with the wreck, and how much room was there?

70 Ans. There was room for two vessels to pass abreast. There was at least one hundred and forty feet not occupied by the wreck.

Redirect examination.

1st. State whether after sounding around the wreck you placed a buoy over her.

(Objected to as immaterial.)

Ans. I don't think I placed a buoy over her; I think Packard & Co. did.

2nd. When?

Ans. I am not positive what month Packard commenced removing the wreck, but it was at that time the buoy was put there.

3. State over what part of the wreck they placed the buoy?

Ans. At the stern of the wreck; I had that impression from the locality of the buoy.

71 4th. How far distant was this from the north pier?

Ans. According to my impression now, about fifty feet?

5th. State, if you know, the length and size of the McKay, and what kind of a bow or stern she had.

Ans. I don't know her exact length; I should think she was about sixty feet long or more; she seemed to have been well built, with the ordinary stern-post, such as vessels ordinarily have.

L. C. HUGUNIN.

Deposition of Stephen Clement.

1st. What is your name, age, occupation, and place of residence?

Ans. My name is Stephen Clement. I am forty-eight years of age. I reside in Chicago.

2nd. State what experience you have had in sailing vessels of various descriptions on the lakes?

72 Ans. I have sailed all classes of vessels as master, from a forty-ton vessel up to a thousand; that is including steam vessels and sail vessels. I have been more or less engaged in the sailing business since the year 1830 up to the present time. I have sailed as master of steamers and vessels fifteen years; out of that time I have sailed vessels and steamboats that I have been interested in as part owner. I first became interested in vessels as owner in the year 1837; I have owned stock in vessels most of the time since; in 1857 I owned one third of the bark Pacific; I did not own anything else at that time. I was agent for and had the management of all Capt. Ward's vessels running to this port ever since 1842.

3d. State whether in the fall of 1856 or spring of 1857 you knew or whether it was currently known by the sailing community at this port that there was a sunken vessel lying in the mouth of the Chicago River.

Ans. I did not know of there being any sunken vessel there until after the Huron was sunk, nor did I believe that it was generally known.

73 7th. From your knowledge and experience as an expert is it or not good seamanship to back a steamer of the size and draft of the Huron out of the Chicago River?

Ans. I should think it was good seamanship, but that depends upon the circumstances in which a man is placed.

8th. Suppose the Huron, a steamboat of one hundred and sixty-five feet length, to be lying at Hugunin's dock, opposite to the Illinois Central Railroad slip, in the evening, and drawing about six feet of water, and about to leave the Chicago Harbor, would it be good or bad seamanship to back her out rather than to turn and go out head first?

(Objected to as irrelevant.)

Ans. It would be good seamanship, provided he could save time and labor by it. I have backed out much larger steamers a great many times from about the same place. I backed out steamers into the lake from the foot of State street; there was no bridge below that street then; it was a very common practice with me.

74 9th. State whether you knew of there being a sunken wreck near the steamer Huron after the accident, and your mode of information.

Ans. I know there was a wreck there after the accident to the Huron. I knew it by seeing a vessel fetch up on it while looking at the Huron one day.

10th. State about how far from the pier the vessel struck the wreck.

(Objected to as incompetent and irrelevant.)

Ans. I should think about sixty-feet from the pier.

Cross-examination.

1 c. int'y. State if a steamer like the Huron can be managed or handled as well and can her course be as readily changed when moving backwards as when moving forwards.

Ans. She cannot be handled as well and her course cannot be as readily changed when moving backwards as when moving forwards.

75 *Redirect.*

1st. State if you know Captain Morgan, the witness in this case; and if yea, what his character is for seamanship.

Ans. I know Capt. Morgan. I know him to be a good seaman, and believe him to be fully competent to take charge of a steamboat.

S. CLEMENT.

Witness recalled by proctor for libellants.

Proctor for respondents objects to the recalling of the witness for the purpose of re-examination.

State whether or not a steamer like the Huron can be handled as safely going backward as forward.

(Objected to as leading.)

Ans. She can. A steamer has the power to stop and go ahead and change her position at will; therefore I consider it perfectly safe for her to back out.

S. CLEMENT.

FEB. 20th, 1862.

Deposition of John F. Stafford.

1. What is your name, age, and place of residence?

76 Ans. My name is John F. Stafford. I am in my forty second year. I reside in Chicago.

6. Suppose said steamer to be lying at Hugunin's dock, opposite the Illinois Central Railroad slip about 7 o'clock p. m., and drawing about six feet of water, and about to leave the Chicago Harbor, would it be good or bad seamanship to back out into the lake?

Ans. Weather and all things favorable it would be good seamanship.

Cross-examination by J. W. Buell, esq.

2 c. int'y. State if a steamer like the Huron can be managed or handled as well and can her course be as readily changed when moving backwards as when moving forwards.

Ans. No boat can be handled as well, but they can be handled with perfect safety. Her course cannot be changed as readily.

3 c. int'y. Can a steamer like the Huron be handled as safely in a narrow channel like the Chicago River when moving backwards as when

77 moving forwards?

Ans. Yes.

4 c. int'y. Do you recollect of the circumstance of the wrecking of the McKay; and did you know at the time of the fact?

Ans. Yes; I did.

5 c. int'y. Was the fact of the wreck McKay lying in the river a matter of general remark among sailors and vessel-owners during the fall of 1856 and the spring of 1857?

Ans. It was during the fall of 1856. I do not remember of hearing anything said about it in the winter or spring of 1857 until after this boat struck.

6 c. int'y. Did Goodrich & Drew own the steamer Huron in 1856, and did they sail her to and from the port of Chicago at different times during that season?

Ans. I understood them to be owners. I have seen the boat go out and in the harbor during that season frequently.

JOHN F. STAFFORD.

78 *Deposition of Nathaniel S. Bonton.*

1st. What is your name, age, occupation, and place of residence?

Ans. Nathaniel S. Bonton. I am 34 years of age. I am the owner of a foundry and machine shop. I reside in Chicago.

2. Were you city superintendent for the city of Chicago in 1857?
Ans. Yes.
3. State what were your duties as such officer.
Ans. The duties were to attend to all the public works and improvements and superintend the fulfillment of all contracts whereby money was expended; such other work as was from time to time ordered by the mayor and common council.
4th. Did you as such officer make any contract for removing the wreck of the McKay from the mouth of the river? And if yea, state when and to whom.

79 Ans. In 1857 I made an agreement with Samuel Packard and some other party—the name I have forgotten now—to remove all the wrecks and piles which were in the navigable parts of the river, of which the McKay was one. I don't remember whether I made any written contract with them or not, or whether any written contract was executed. There was an agreement made. The price agreed upon was, I think, three thousand dollars. I think the contract for taking out the McKay was separate from the above. I do not remember at what price.
5. State, if you know, whether the city paid for the said work and from what funds.
Ans. I gave a certificate for the work when it was completed, payable, I think, from harbor improvement fund.

Cross-examination by J. W. Buell, esq'r.

1 c. int'y. Is what you have stated before all that the city did in the matter of removing the wreck McKay of which you have personal knowledge?
Ans. All we did was to make an agreement for the price with Samuel Packard & Co., and they got her out and we paid for it.

80 N. S. BONTON.

Deposition of John B. Warren.

1st. What is your name, age, occupation, and place of residence?
Ans. My name is John B. Warren. I am 40 years of age. I am a sailor. I reside in Chicago.
2nd. What experience have you had in sailing.
Ans. I have sailed about 23 years. About 15 out of the 23 I have sailed on Lake Michigan, between Chicago and Grand Haven. I was on sail vessels until 1854. Since that time I have been on steamers.
3d. Where were you sailing in 1857?
Ans. In the spring of 1857 we ran between Chicago and Grand Haven. The first month or two I was sailing as master of the propeller Troy.
8th. State whether you were accustomed to stop at Hugunin's dock, and are familiar with the river from that point to the lake.

81 Ans. I was.
9th. Suppose the Huron to be lying at Hagunin's dock in the evening, and drawing about six feet of water, and about to leave the harbor, would it be good or bad seamanship to back her out into the lake?
(Objected to as incompetent.)
Ans. I should consider it good seamanship; I should not consider it bad seamanship to back out the Huron.
10th. State whether you know Captain Morgan; if yea, what his reputation is as a sailor.
(Objected to as incompetent.)
Ans. I consider him a good sailor, and a competent man to take charge of a steamer.

11th. State whether in the fall of 1856 you saw the wreck of the McKay lying in the mouth of the river; and if yea, whether any portion of her was visible above water in the spring of 1857.

Ans. I saw her in '56, when she was wrecked there. In the spring
82 when the water was low and the wind in the southard, she was visible, but in the ordinary state of water she was not visible.

13. Did you see the Huron lying in the river in '57, and were you familiar with her position?

Ans. I did see her, and was familiar with her position when she was a wreck.

Cross-examination by J. W. Buell, esq.

5 c. int'y. State if a steamer like the Huron can be managed or handled as well, and can her course be as readily changed when moving backwards as when moving forwards.

Ans. No; her course cannot be as readily changed when going backwards as when going forwards.

6 c. int'y. Do you recollect the circumstance of the wrecking of the McKay, and did you know the fact at the time she was wrecked, or soon after?

Ans. Yes, I was here when she was wrecked, in Chicago.

83 7 c. int'y. Was the fact of the wreck McKay lying in the river a matter of general remark among sailors and vessel owners during the time it lay in the river?

Ans. I heard a good many speaking of it. In the fall of '56, especially. I can't say whether I heard any one speak of it in the spring of 1857.

8 c. int'y. Was the fact of the wreck lying there in the river generally known to sailors and vessel owners in the city of Chicago?

Ans. I presume they knew it.

7 c. int'y. Did the steamer Huron sail to and from the port of Chicago frequently during the season of navigation of 1856, and subsequently to the time of the wreck of the McKay?

Ans. I don't know where she was trading in 1856; I don't think she was running between here and Grand Haven in the fall of 1856.

Redirect.

1. In your answer to the eighth cross-interrogatory, to what time did you refer?

84 Ans. I refer particularly to the fall, on account of her being visible at all times.

2. In your opinion, was it or not generally known by the sailing community at this port in the spring of 1857, before the wreck of the Huron, that there was an obstruction in the mouth of the river where said McKay lay?

Ans. I suppose it was generally known.

Where did you spend the winter of 1856 and '57?

Ans. I spent the winter in Grand Haven.

When did you come here in the spring of 1857?

I came here the last of March.

JNO. B. WARREN.

85 *Deposition of Charles Harding.*

1st. Wnat is your name, age, occupation, and place of residence?

Ans. My name is Charles Harding. My age is forty-five. I reside in Chicago.

2nd. Have you been engaged in the wrecking business on the lakes? If yea, state how long, and what experience you have had in the same.

Ans. I have; I commanded the wrecking boat Salvo one whole year and part of another; I think I took out twenty wrecks one year. I got out in the fall of 1856 several propellers and schooners and one steamboat.

9th. From your knowledge and experience as a sailor, is it or not good seamanship to back a steamer of the size of the Huron out of the Chicago River?

(Objected to.)

Ans. I do not consider it bad seamanship by any means to back a steamer out of this river; I have seen it done in every port on the lakes very frequently.

86 *Cross-examination.*

3 c. int'y. State if a steamer like the Huron can be managed or handled as well, and can her course be as readily changed when moving backwards as when moving forwards.

Ans. She cannot be managed as well when going stern first as when going head first; she can be stopped as quick, and I think a little quicker. She cannot be steered as well when going stern first as when going bows first; her course cannot be changed as readily.

4 c. int'y. During the fall of 1856 and the early part of the spring of 1857 was it generally known among sailors and vessel owners that the wreck of the McKay was lying near the mouth of the Chicago River, and was not the fact a cause of remark generally among them?

Ans. In the fall of 1856 the wreck was visible; a part of her was out of water and they must all see her. The spring of 1857 the wreck was submerged all under water, and from my personal knowledge I know
87 they did not all know the exact location. The reason I know that they did not all know the location, captains frequently asked me about this wreck. I made it my business to go and examine where the wreck was. I was in the wrecking business, and I told everybody who asked me where it was.

FEBRUARY 22, 1862.

Redirect examination.

1st. Was it before or after the sinking of the Huron that the sailing community asked you as to the location of the wreck McKay?

Ans. It was after the sinking of the Huron.

2nd. What was the general opinion as to there being a wreck there in the spring, previous to the sinking of the Huron?

(Objected to as incompetent.)

Ans. I have no recollection of hearing any one say anything about the wreck previous to the sinking of the Huron. I don't know what the opinion was.

3d. Was there any buoy over the wreck before that time or at that
88 time? If yea, state when it was first put there, what kind of a buoy it was, and where it was placed.

(Objected to as immaterial.)

Ans. There was a buoy or flag on a stick placed over the bow of the wreck after the accident. I should think about a week.

4th. Did you ever run on or see other vessels run on said wreck? If yea, when and where, and describe the position of said wreck?

Ans. To the best of my knowledge I never run on it, but I think I have seen two vessels run on it; one certain, and I think two. This was after

the sinking of the Huron. The wreck lay, I should think, as in figure two, Exhibit A, the stern laying near the pier and the bows heading southeast.

5th. Was the whole river between the piers when unobstructed by wrecks a good channel for steamers of seven feet draft of water?

Ans. Yes, sir, between the two piers.

89 6th. When you say a steamboat cannot be as well handled when going backward as when going forward, do you mean that to apply to her safety? Explain fully what you mean.

Ans. I mean that she cannot steer as straight. It is perfectly safe to back a boat down the creek as it is to go head first.

Recross-examination.

1st. About what is the width of the river at the point where the wreck lay, and what proportion of the river to your knowledge did the wreck occupy?

Ans. I can't tell exactly how wide the river is there. I should think it was two hundred and fifty feet across there. I can't tell the exact distance. It may not be over two hundred. The south pier at that point was under water. The boat to the best of my knowledge was about one hundred feet long; her stem lay about four feet from the north pier. The pier laid east and west, and I think she laid about southeast and northwest. I

90 should think the bow lay about sixty feet from the north pier.

Questions by D. Goodwin, jr., esq.

You have stated that the south pier opposite to the wreck was under water. Was it or not customary for boats and vessels coming in and going out of the harbor to give said south pier as wide a berth as possible?

(Objected to as incompetent.)

Ans. Yes, vessels generally gave the south pier as wide a berth as possible, as they did not know where it was or where the sunken piles were. They knew they were there, but they did not know how far they extended out.

CHARLES HARDING.

91 *Exhibit* 3, *bill of sale of vessel.*

To all to whom this bill of sale shall come:

Know ye that E. B. Ward, administrator of the estate of Samuel Ward, deceased, and E. B. Ward, of Detroit, Michigan, for and in consideration of the sum of seventeen thousand dollars, to them in hand paid at or before the ensealing and delivery of these presents, by A. E. Goodrich and Geo. C. Drew, of Chicago, State of Illinois, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, assigned, transferred, and delivered unto the said A. E. Goodrich and Geo. C. Drew the good steamer called the Huron, together with all and singular her anchors, chains, cables, masts, rigging, tackle, apparel, and furniture of every name, kind, and description whatsoever, this the 10th day of August, A. D. 1855, the certificate of whose enrollment is in the words and figures following, to wit:

No. 12.—*Enrollment.*

DISTRICT OF MICHIGAN, *Port of Detroit:*

92 In conformity to an act of Congress of the United States of America, entitled "An act for enrolling and licensing ships and vessels, &c.," passed the 18th February, 1793, and "An act to regulate

the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States, and for other purposes," passed the 2d March, 1831, and "An act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam," passed 7th July, 1838, and 3d of March, 1843, and July 29th, 1850, Samuel Ward, of Newport, St. Clair County, Wisconsin, having taken or subscribed the oath required by the said acts, and having sworn that he is owner of one half, and E. B. Ward, of Detroit, Michigan, is owner of one half, and that they are citizens of the United States, sole owners of the steamboat or vessel called the Huron, whereof George Cottrel is at present master, and, as he hath sworn, is a citizen of the United States, and that the said ship or vessel was built at Newport, Michigan, in the year 1852, as appears by the certificate of J. L. Wolverton, master builder, on file in this office, dated at Detroit the 10th day of April, 1852, and W. H. Goodenow, special surveyor, having certified that the said steamboat vessel has one deck and one mast, and that her length is one hundred and sixty-five feet and no inches, her breadth is twenty-three feet and six inches, her depth is nine feet and four
93 inches, and that she measured three hundred and forty-eight tons, and thirty-six ninety-fifths, and that she is a steamboat, has no galley, and no scroll or figure-head, and the said Samuel Ward having agreed to the description and admeasurement above specified, and sufficient security having been given in conformity with the terms of the said acts, the said steamboat has been duly enrolled at the port of Detroit.

Given under my hand and seal of office, at the port of Detroit, in the said district, this 12th day of April, in the year one thousand eight hundred and fifty-two.

[L. S.] (Signed) W. H. GOODENOW, *Deputy Collector.*

To have and to hold the said granted and described steamboat and other the premises hereby granted, bargained, sold or mentioned, or intended so to be, unto the said A. E. Goodrich and Geo. C. Drew, their heirs and assigns, to their sole and only proper use, benefit, and behoof forever.

And the said E. B. Ward, administrator of the estate of Samuel Ward and E. B. Ward, for themselves, their heirs, executors, and administrators, do hereby covenant, promise, and agree to and with the said A. E. Goodrich and Geo. C. Drew, their heirs and assigns, that at the time of the ensealing
94 and delivery of these presents, they, the said E. B. Ward, administrator of the estate of Samuel Ward, deceased, and E. B. Ward, sole, true, and lawful owner of the said steamboat Huron, and other premises hereby granted, bargained, and sold or mentioned, or intended so to be, and have in said boat good power, right, and authority to sell and dispose of the same in manner aforesaid.

And furthermore, that we, the said E. B. Ward, administrator of the estate of Samuel Ward, deceased, and E. B. Ward, will forever warrant and defend the said and other premises hereby granted, bargained, and sold or mentioned, or intended so to be, unto the said A. E. Goodrich and Geo. C. Drew, heirs and assigns, against the lawful claims or demands of all persons whatsoever.

In witness whereof, the said E. B. Ward, administrator of the estate of Samuel Ward, deceased, and E. B. Ward have hereunto set their hands and seals, at Detroit, Mich., this tenth day of August, A. D. 1855.

E. B. WARD.

E. B. WARD, [SEAL.]

Administrator of Samuel Ward, deceased.

In presence of—

GEO. R. GIVAN.

95 Endorsed: Steamer Huron. Bill of sale. District of Chicago, port of Chicago.

Filed for record March 4, 1857, at 11 o'clock a. m., and recorded in Book B of Bills of Sale, pages 233 and 234.

T. G. KINSELLA, *Dep. Collector.*

The deposition of Sanford W. Morgan taken before O. K. A. Hutchinson, commissioner, on the 18th day of October, A. D. 1862.

1st. Are you the Captain Morgan formerly examined in this case?

Ans. Yes.

(Proctor for the respondent objects to the examination of this witness because he is interested.)

12th. State as particularly as you can precisely how long the boat remained afloat after the accident. Whether it was possible to have prevented her from sinking.

Ans. She remained afloat about fifteen to twenty minutes I should
96 judge. It might have been less. She could not be prevented from sinking. Couldn't tell where the hole was. When she struck this wreck she struck her rudder and broke the rudder chains and knocked a hole in her. We repaired the rudder chains. We always carry links on the boat for that purpose. It probably took four or five minutes. Found she was sinking and turned her and came into the river. She swung round and headed off about south. We got her to the north side of the dock as quick as we could.

13th. How long after she broke the rudder chains and you started to repair the same before you discovered she was leaking?

Ans. It wasn't two minutes, I don't think. The engineer first told me she was leaking. The fireman was down in the hold and passed up the word I believe. He sent a man up to the pilot-house to tell me to hurry and get to the dock as the crank was in the water. As she made a revolution the crank went under water. The crank was not over three feet under deck, and at every revolution it went into the water.

14th. After the rudder chain was repaired how many minutes
97 elapsed before she sunk?

Ans. It couldn't have been over ten or fifteen minutes.

15th. How long was it before you got her headed up the river from the time you got the chain fixed?

Ans. It probably took five minutes.

16th. Was it possible in any way to have gotten said boat up as far as Hugunin's dock?

Ans. We went just as far as we could go where she was; she couldn't have gone her length further. We got her in close to the dock, and there was so much water in her that she stopped right there.

17th. Describe the depth and character of the hold where the hole was made, how the same was covered, and whether it was possible to have reached the hold and stopped the leak.

Ans. It wasn't possible for any man to do it. Couldn't tell where the hole was, and if you knew I don't think that sized hole men could have stopped it before she sank there was such a pressure of water rushing
98 in there. The hole was under the cabin floor. We didn't know where the hole was till we raised her and pumped her out. As soon as we raised her we put canvass under her. Drew it under her bottom and then pumped her out.

18th. How many decks were there?

Ans. Three and three cabins.

19th. How far above the hole made by the accident was the lower cabin floor, and was it possible to get beneath said floor while the water was pouring through the aperture?

Ans. About three feet. It was not possible to get beneath the floor. It must have been full under there in fifteen seconds.

20th. Was it possible or not to have gotten canvass under the said hole even if you had known where the same was situated in time to have prevented her from sinking?

Ans. It was not.

21st. If you had put into use all the pumps on said boat after dis-
99 covering she was leaking could they or not have produced any effect in reducing the water inside of her?

Ans. They could not.

Cross-examination.

1st. Did you state on your former examination anything about the rudder striking on the wreck or the rudder-chains being broken? If not, why did you suppress that fact?

Ans. If I didn't, it was because the question wasn't asked me.

2nd. Where did the break occur in the rudder chain, and who assisted in repairing it?

Ans. I think it was in the forward part; will not be sure. The mate assisted in repairing it.

3d. Did you feel the shock when the rudder struck the wreck, and did you afterwards feel another shock when the hole was made in the hull, or was your first knowledge of the latter injury obtained from the engineer, as you have stated?

100 Ans. I felt it when the rudder struck and broke the chain, and when she knocked the hole through her.

4th. Did the striking of the rudder or not impede the progress of the boat, and what was the length of time that intervened between the two shocks you say you felt?

Ans. I should think it wouldn't much. It wouldn't stop a boat to break the rudder all to pieces. The wheel chains could not stop the boat. Five or six seconds intervened between the two shocks.

5th. Did the second shock stop the boat? If so, state what effect it had.

Ans. I think it did or nearly so.

6th. Did the boat swing clear of the wreck immediately after she struck, or did she become fast upon the wreck?

Ans. She went clear as soon as we went ahead with the engine We started her ahead as soon as she struck. The time between the two shocks was inappreciable. I think the engine was started about the time of the second shock. The engine couldn't more than got started by the
101 time of the second shock.

7th. What was the direction of the boat when she struck?

Ans. I should think she was heading about west-southwest.

8th. Was there any wind? If so, from what direction?

Ans. I don't remember.

9th. How far did she swing round after the rudder chain was broken, and what caused it?

Ans. She swung round about south, I should think. I guess it must have been the wind; it might have been the current.

10. If she struck on her starboard quarter with force enough to break in her planking and stop her progress in the water, would not the collision have had a tendency to swing her bow further round towards the west or northwest and up the river?

Ans. No. It would have a tendency to swing her further south.

102 11th. Did you see the hole made in her hull before the hole was stopped or anything done to it?

Ans. Yes.

12th. Describe the hole as it was when you first saw it, and state whether the planks were broken off or only fractured and partially driven in. Was any piece of planking broken entirely out and gone, and how many of the planks were injured?

Ans. The hole was knocked right through. There were no pieces of plank left in the hole at all. One plank was injured. I believe the hole was about twelve by sixteen inches.

13th. How wide were the planks on the hull of the Huron? What kind of sheathing was inside of the hull? How thick was the planking, and was the sheathing inside broken by the collision?

Ans. The upper streaks on a steamboat would range from four to seven inches. The bottom ones are put in all sorts of widths, just as they can get plank. Are not particular about widths on the bottom. I think they were two inches and a half thick. There wasn't any sheathing right over the hole.

There is no sheathing through the centre of a steamboat for about

103 two feet each side. There is on some, but there wasn't on her.

14. State as near as you can the exact position of this hole, and how far it was beneath the surface of the water at the time of the accident.

Ans. The hole was next to the keel on the starboard side, from fifty to seventy feet from the stern. The plank that came next to the keel was the one knocked through. I should think it was about five feet beneath the surface of the water.

15. Who was the engineer on board at the time, and where is he now?

Ans. His name was Stanly. I don't know where he is. The last time I saw him was about a week after the boat sunk.

16th. How many and what kind of pumps did you have on board the boat at the time of the accident?

Ans. There were two that worked by steam and either one or two by hand. I forgot which.

17th. Did the air pump of the Huron have a bilge-water connection?

104 Ans. Yes, sir.

18th. What other means aside from the above did the boat have for freeing itself from water, and to what extent were these pumps brought into use?

Ans. The pumps worked by steam, and the air pumps were both worked as soon as the water came into them. The engineer started them as soon as he discovered water.

19th. State how large was the hold in which this hole was made and what was in the hold at the time, and what was the access to it. State further what means, if any, were employed to ascertain the position of the leak.

Ans. This hold was about three feet between the bottom of the hold and the cabin floor, and about thirty feet long. Nothing was in it at the time. There was a trap-door in the cabin floor. There was no other means of getting into that space. There was no means employed to ascertain the position of the leak; there was no time. She was filling so fast there wasn't any use looking for that.

20th. Have not injuries of the same character, but a more serious

105 description, occurred upon two steamboats upon the lakes, when the leak has been stopped by passing canvass over it, and the boat saved?

Ans. You couldn't get canvass under her in that time. I don't know of any boat being saved in that way. Nobody but our Maker could do that in that length of time.

21. Did you ever hear of a similar accident to the steamboat Lady Elgin, some years since, on Lake Superior, and was she not saved in that way, after having been badly stove by running upon a rock?

Ans. I heard she was sunk in Lake Superior. Heard they sent to Detroit and got steam pumps and drew canvass under her and pumped her out.

Redirect examination.

22d. How wide were the widest planks in the bottom of the Huron?

Ans. Somewhere about eighteen or twenty inches.

S. W. MORGAN.

Subscribed and sworn to before me this 18th day of October, A. D. 1862.

O. K. A. HUTCHINSON, *U. S. Commissioner.*

106 *Respondent's proofs.*

Transcript of a judgment in the circuit court of Cook County, State of Illinois; which said transcript, together with the stipulation thereon endorsed, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the Honorable George Manierre, judge of the seventh judicial circuit of the State of Illinois, and sole presiding judge of the circuit court of Cook County, in the State aforesaid, and at a term thereof, begun and held at the court-house, in the city of Chicago, in said county, on the second Monday (being the twelfth day) of April, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the said United States the eighty-second.

Present: Honorable George Manierre, judge of the 7th judicial circuit of the State of Illinois; Carlos Haven, State's attorney; John L. Wilson, sheriff of Cook County.

Attest: WILLIAM L. CHURCH, *Clerk.*

107 Be it remembered, that heretofore, to wit, on the sixteenth day of September, in the year of our Lord one thousand eight hundred and fifty-seven, there was filed in the office of the clerk of the said court a certain præcipe, in words and figures following, to wit:

Cook County circuit court, of the October term, A. D. 1857.

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
THE CITY OF CHICAGO. } Case.—Damages $25,000.

The clerk will issue summons in the above-entitled cause returnable to the October term of the Cook County circuit court, and directed to the sheriff of Cook County.

Chicago, 16th Sept., 1857.

ISAAC N. ARNOLD, *Att'y for Pl'ffs.*

And thereupon, to wit, on the same day and year last aforesaid, there was issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of said county to execute, in words and figures following, to wit:

STATE OF ILLINOIS, *County of Cook, ss:*

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon the city of Chicago, if it shall be found in your county, personally to be and appear before the circuit court of Cook County on the first day of the next term thereof, to be holden at the court-house, in Chicago, in said county, on the second Monday of October next, to answer unto Albert E. Goodrich and George C. Drew, in a plea of trespass on the case to the damage of the said plaintiffs, as is said, in the sum of twenty-five thousand dollars. And have then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness William L. Church, clerk of our said court, and the seal thereof, at Chicago aforesaid, this sixteenth day of September, A. D. 1857.

WM. L. CHURCH, *Clerk.*

And afterwards, to wit, on the seventeenth day of September, in the year last aforesaid, said writ of summons was returned into the court aforesaid, by said sheriff, endorsed as follows, to wit:

Served by reading to the within-named city of Chicago, by summoning John Wentworth, mayor, Herman Kreissman by delivering a copy thereof to them the 17th day of September, 1857.

JOHN L. WILSON, *Sheriff,*
By GEORGE ANDERSON, *Deputy.*

Fees, 2; service 1 00; 2 copies, 1 00; 2 mile, 10; return, 10; 2 20 p'd by ch'g att'y.

And afterwards, to wit, on the 30th day of September, in the year last aforesaid, said plaintiffs, by their attorneys, filed in said court their certain declaration in words and figures following, to wit:

Cook County circuit court, of the October term, 1857.

STATE OF ILLINOIS, *County of Cook, ss:*

ALBERT E. GOODRICH AND GEORGE C. DREW
vs.
CITY OF CHICAGO.

Albert E. Goodrich and George C. Drew, plaintiffs in this suit, by Arnold, Larned & Lay, their attorneys, complain of the city of Chicago in a plea of trespass on the case—

For that whereas, by a law of the State of Illinois approved Feb'y 14th, 1851, creating the corporation of the city of Chicago, in the county of Cook, it became and was the duty by law of the said defendant to remove and prevent all obstructions in the waters which are public highways in the city of Chicago, and to widen, straighten, and deepen the same, and for that purpose the said corporation of the city of Chicago were authorized to levy and collect taxes upon all and singular the real and personal property situated in said city.

And whereas the city of Chicago assumed to discharge the duty and obligation imposed upon it by law, and for that purpose have, from the date of the incorporation of said city, levied and collected taxes and assessments, and controlled, regulated, and managed the navigable waters of said city, and, for the purpose of carrying out said objects, have levied and collected taxes from the date of the incorporation of said city, of and upon all and singular the real and personal property in said city; by means whereof, and by the laws of this State, it became and was the duty of said defendant to remove and prevent all obstructions in the waters which are public highways in said city.

And whereas said defendant entered upon and undertook to discharge such duty and obligation by the passage of ordinances, rules, and regulations in relation thereto; by means whereof it became and was the duty of said defendant immediately and within a reasonable time to remove all obstructions in the waters which are public highways in said city, and, until so removed, to place buoys and signals so as to point out the danger therefrom.

111 And whereas the Chicago River and Harbor, so called, is a public highway in said city, to the end of the north and south piers; being such public highway, the said defendant, not regarding their duty in the premises, heretofore, to wit, on the 29th day of March, 1857, and for a long time prior thereto, to wit, for the space of five months, wrongfully, negligently, and carelessly suffered and permitted an obstruction to be and remain in said waters so being such public highway, to wit, the hulk of the schooner James McKay, so called, and knowingly, carelessly, and negligently suffered, continued, and kept and permitted said wreck of said sunken vessel in said public highway, to wit, at or near the neighborhood of the mouth of the same, and inside of the north pier, and did not, nor would they, during all said time remove or caused to be removed the said hulk, or place any buoy or signal thereon, although well knowing that the same was there as aforesaid, out of sight, and beneath the water, as this plaintiff avers; by means whereof, and in consequence of which negligence of said defendant, afterwards, to wit, on the day and year aforesaid, a certain steamboat, the property of and belonging to the said plaintiffs, called the Huron, of great value, to wit, of the value of twenty-five thousand dollars, therein

112 then and there going and passing in and through the said stream, was accidentally, and without any fault, negligence, or misconduct, or any want of care and skill on the part of the said plaintiffs or their agents in that behalf, run upon and against the said obstruction and wreck so remaining beneath the water as aforesaid, and was thereby then and there greatly damaged and injured; and the said plaintiff thereby then and there became and was deprived of the use of their said steamboat for the space of 74 days, and then and there were obliged to expend, and did expend, divers sums of money, in all amounting to a large sum, to wit, to the sum of twenty-five thousand dollars, in and about the raising and repairing of their said steamboat, and the said plaintiffs are, by means of the premises, otherwise greatly injured, to wit, at the county of Cook aforesaid.

2nd. And for that whereas before and at the time of the committing of the grievance hereinafter mentioned, there was, and from thence hitherto hath been, and still is, a certain common and public navigable stream in said county of Cook, called the Chicago River and Harbor, for all persons

113 to pass and repass within, and by boats, barges, steamboats, and vessels, at their free will and pleasure, subject to such regulations as the city of Chicago may impose; and the said defendant was, before the time of the committing the grievance complained of, and still is, possessed of the jurisdiction, management, and control of the said harbor, by an act of the

legislature of Illinois, approved Feb'y 14th, 1851, wherein, among other things, the said defendant was authorized and empowered "to remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten, and deepen the same," and to collect such taxes and pass such ordinances as should be needful to carry said power into effect, and in pursuance thereof the common council of the city of Chicago did, on the 20th day of May, A. D. 1856, pass an ordinance for the removal, without delay, of any obstruction to the free navigation of said harbor, wherein, among other things, it was ordered that—

SEC. 3. Whenever there shall be in the harbor any vessel, craft, or float insecurely fastened, adrift, sunken, or laid up, not in use, which may
114 require to be fastened, raised, removed, or its location changed, it shall be the duty of the harbor master, or his assistants, to notify the owner, master, or other person who may be in charge thereof, to secure, raise, or remove such vessel, craft, or float without delay. But if the harbor master or his assistants shall be unable to find the master, owner, or person in charge of such vessel, craft, or float as aforesaid, or if no person answering such description can be found by him or them, such notice shall not be required.

And whereas the said Chicago River and Harbor, so called, is a public highway in said city to the ends of the north and south piers, and being such, it became and was the duty of the said defendant to remove, or caused to be removed, all obstructions to the free and safe navigation of the said river and harbor, yet the said defendant, well knowing the premises, heretofore, to wit, on the 29th day of March, A. D. 1857, and for a long time previous thereto, to wit, for the space of five months, wrongfully and unjustly kept and continued the wreck or hulk of a sunken vessel, to wit, the wreck of a sunken schooner known as the schooner James McKay,
115 in the said harbor, at or near the mouth of the Chicago River, and inside the north pier, so called, in and under water, so that the same could not be seen, without fixing or placing, or causing to be fixed or placed, any mark or signal at or near such obstruction to denote that the same was so there as aforesaid, wrongfully and unjustly keeping and continuing the said hulk or wreck so sunk then and there in that place without raising up or removing, or causing to be raised up and removed, said obstruction, as by said ordinance in such case made and provided said defendant was bound to do, and without erecting or placing, or causing to be erected or placed, any buoy, float, or signal to denote the place where the said wreck or hulk was sunk, or without giving any notice or information thereof to the public or to these plaintiffs, by means of and in consequence of which negligence of said defendant in not removing said sunken vessel, and in omitting to place any buoy, mark, float, or signal at the place of such obstruction, or to give notice thereof, afterwards, to wit, on the day and year aforesaid, a certain steamboat, the property of and belonging to the said plaintiffs, called the Huron, of great value, to wit, of the value of twenty-five thousand
116 dollars, with her cargo, engines, machinery, and furniture therein, then and there going and passing in and through the said river, was accidentally, and without any fault, negligence, misconduct, or want of care and skill on the part of the plaintiffs, run upon and against the said obstruction and wreck so remaining beneath the water as aforesaid, and was thereby then and there greatly damaged and injured; by means whereof the said steamboat immediately thereafter, with her cargo, engines, machinery, and furniture, sunk, to wit, at the county aforesaid, and the said plaintiffs thereby then and there became and were deprived of the use of their said steamboat for a long space of time, to wit, for the space of seventy-four (74) days, and were then and there obliged to expend, and did expend, divers

sums of money, in all amounting to a large sum, to wit, the sum of twenty-five thousand dollars, in and about the raising and repairing of their said steamboat, and the said plaintiffs are, by means of the premises, otherwise greatly injured, to wit, at the county of Cook aforesaid, to their damage of twenty-five thousand dollars.

3d. And whereas, also, before and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, there was,
117 and from hence hitherto hath been, and still is, a certain other common and public navigable river in said county of Cook called Chicago River or Harbor, for all persons to pass and repass within and by boats, steamboats, barges, and vessels at their free will and pleasure, subject to such regulations as the city of Chicago may impose; and which said public navigable river was, at the time of the grievance hereinafter mentioned, under the exclusive control and jurisdiction of the said defendant, and it was then and there the duty of the said defendant to keep the said Chicago River or Harbor free from obstructions in such manner that all persons might pass and repass, sail and navigate the same at their free will and pleasure safely and securely; and whereas the said Chicago River or Harbor is such public highway in said city to the end of the north and south piers, yet the said defendant, well knowing the premises, heretofore, to wit, on the 29th day of March, A. D. 1857, and for a long time previous thereto, to wit, for the space of five months, wrongfully and unjustly kept and continued the wreck of a sunken vessel, viz: the wreck of a certain schooner known as the McKay, or James McKay, in said harbor, at or near the mouth of
118 the Chicago River, so being such public highway, viz: in the said Chicago River, at or near the mouth of the same, and inside the north pier, so called, and under water, so that the same could not be seen, without fixing or placing, or causing to be fixed or placed, any buoy, float, mark, or signal at or near such obstruction, to denote that the same was so there as aforesaid, and did not, nor would they, during all said time, remove, or caused to be removed, the said hulk or wreck, or place any buoy, mark, or signal thereon or near the same to denote the place where said hulk or sunken wreck was, or give notice thereof to the public, or to the said plaintiffs, although well knowing that the said hulk was so there as aforesaid out of sight and beneath the waters; by means of and in consequence of which negligence of said defendant, afterwards, to wit, on the day and year aforesaid, a certain steamboat, the property of and belonging to the said plaintiffs, called the Huron, of great value, to wit, of the value of twenty-five thousand dollars, therein then and there going and passing in and through the said river, was accidentally, and without any fault, negligence, misconduct, or want of care and skill on the part of said plaintiffs or their
119 agents in the management of said steamboat, run upon and against the said obstruction and wreck so remaining beneath the water as aforesaid, and was thereby then and there greatly damaged and injured, and the said plaintiffs thereby then and there became and were deprived of the use of their said steamboat for the space of seventy-four days, and then and there were obliged to expend, and did expend, divers sums of money, in all amounting to a large sum, to wit, to the sum of twenty-five thousand dollars, in and about the raising and repairing of their said steamboat, and the said plaintiffs are, by means of the premises, otherwise greatly injured, to wit, at the county of Cook aforesaid, to the damage of the said plaintiffs of twenty-five thousand dollars.

And they therefore bring this suit, &c., by

ARNOLD, LARNED & LAY,
Att'ys for 3d Plaintiffs.

And afterwards, to wit, at the October term of said court, to wit, on the 16th day of October, in the year last aforesaid, the following proceedings, among others, were had and entered of record, to wit:

120 ALBERT E. GOODRICH AND GEORGE C. DREW
v.
CITY OF CHICAGO. } Case.

This day come the said plaintiffs, by I. N. Arnold, their attorney, and due personal service of process of summons issued in this cause being had on the said defendant, and he being three times solemnly called in open court, comes not, nor does any person for him, but herein he makes default, which, on motion, is ordered to be taken and entered of record. Wherefore said plaintiff ought to have and recover of said defendant their damages herein sustained by occasion of the premises; and on motion of said plaintiffs, ordered that a jury come to enquire of their damages herein.

And afterwards, to wit, on the seventh day of November, in the year last aforesaid, said defendant, by Beckwith & Merrick, its attorneys, filed in said court its certain demurrer in words and figures following, to wit:

Cook County circuit court.

CITY OF CHICAGO
ads.
GOODRICH & DREW.

121 And the said defendant, by Beckwith & Merrick, his att'y, comes and defends the wrong and injury when, &c., and says the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have and maintain his aforesaid action against the said defendant, and he, the said defendant, is not bound to answer the same. And this he is ready to verify. Wherefore by reason of the insufficiency of the said declaration in this behalf the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him.

BECKWITH & MERRICK, *Att'ys for Deft.*

And afterwards, to wit, at the January special term of the said court, to wit, on the 15th day of January, in the year of our Lord one thousand eight hundred and fifty-eight, the following proceedings, among others, were had and entered of record, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
CITY OF CHICAGO. } Case.

122 Ordered that the above cause be, and it hereby is, continued until the next term of this court.

And afterwards, to wit, at the April term of said court, to wit, on the twelfth day of April, in the year last aforesaid, the following proceedings, among others, were had and entered of record, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
CITY OF CHICAGO. } Case.

This day come the said parties, by their attorneys, and the court having heard counsel on said defendant's demurrer to said plaintiffs' declaration, and being well advised in the premises, overrules said demurrer.

And afterwards, to wit, on the 12th day of April, in the year of our Lord one thousand eight hundred and fifty, said parties, by their attorneys, filed in said court their certain stipulation in words and figures following, to wit:

123 Cook circuit court, April term, A. D. 1858.

GOODRICH & DREW
v.
CITY OF CHICAGO.

It is agreed and stipulated in this cause that judgment may be entered by consent sustaining the demurrer filed by the defendant, and an appeal be taken to the supreme court at the next ensuing term thereof, and that the cause shall be tried at said term, and the defendant shall pay the costs of preparing the record and taking up said case, and that defendant will cause the record to be prepared and filed in the supreme court, and that the parties will enter their appearance on said appeal within the the first three days of the said April term.

ARNOLD & LARNED, *for Plaintiff.*
BECKWITH & MERRICK, *for Def'ts.*

And afterwards, to wit, at the same term of said court, to wit, on the thirteenth day of April, in the year last aforesaid, the following proceedings, among others, were had and entered of record, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
vs.
CITY OF CHICAGO. } Case.

124 This day again come the said parties, by their respective attorneys, and by the stipulation of the parties filed in said cause it is ordered that the order heretofore made and entered of record overruling the demurrer of the defendant to said plaintiffs' declaration be, and the same hereby is, vacated and set aside and for nothing esteemed. And by the further stipulation of the parties hereto it is further ordered and considered by the court that the said plaintiffs' said declaration is insufficient in law for them to have and maintain their aforesaid action against the said defendant. Wherefore said plaintiffs elect to stand by their said declaration.

Therefore it is ordered and adjudged by the court that the said defendant do have and recover of the said plaintiffs their costs and charges by them about their defense expended in that behalf, and that they have execution therefor.

And afterwards, to wit, at the November term of said court, to wit, on the 6th day of December, in the year last aforesaid, the following
125 proceedings, among others, were had and entered of record, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
CITY OF CHICAGO. } Case.

On motion it is ordered that this cause be, and the same is hereby, stricken from the docket of this court.

I, William L. Church, clerk of the circuit court of Cook County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all papers and all proceedings, entered of record in a certain cause lately pending in said court on the common law side thereof, wherein Albert E. Goodrich and George C. Drew were plaintiffs and city of Chicago defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Chicago, this first day of November, A. D. 1861.

[SEAL.] WM. L. CHURCH, *Clerk.*

Endorsed: Filed Jan'y 19, 1863.

WM. H. BRADLEY, *Clk.*

Also endorsed as follows, viz:

126 U. S. circuit court, northern district of Illinois.

ALBERT E. GOODRICH, GEORGE C. DREW
v.
THE CITY OF CHICAGO. } In admiralty.

It is admitted by the parties to the above-entitled case that the judgment of the circuit court sustaining the demurrer filed in the within case was taken by appeal to the supreme court of the State of Illinois, and that judgment was rendered by said supreme court sustaining the judgment below, and that the decision of said supreme court is reported in the 20th volume of the Illinois Reports, page 445.

GOODWIN, LARNED & GOODWIN, *for Libellants.*

127 The deposition of Edward Kelly, taken on the fourth day of June, A. D. 1862, before O. K. A. Hutchinson, commissioner.

1st. What is your name, age, occupation, and place of residence?

Ans. Edward Kelly; thirty-four; marine inspector for the Ætna Insurance Company, Chicago.

2nd. Where did you reside in the fall of 1856 and the spring of 1857, and what was your business at that time?

Ans. Resided in Chicago, and was in commission lumber business.

3d. Did you know of the wreck of the schooner Jas. McKay, near the north pier, in the fall of 1856? If so, state all that you know in regard to it.

Ans. I knew of the wreck of the James McKay in the fall of 1856. Was standing on the pier when she went down. She had a crew on board of her; how much, of course, I don't know. She sunk from the violence of the weather and general debility of the vessel. There was a very severe
128 storm which pounded her against the pier and stove a hole in her. Should think one end of her was from five to ten feet from the pier; the other from fifteen to twenty. Her decks were entirely under water. Her rail was not under. Deck was just covered with water. Her rail, stanchions, and bulwarks were just out of water. The vessel was dismantled within two weeks. Can't be particular as to time; know it was in a short time afterwards; don't know by whom. My impression is that she sunk the fore part of November or latter part of October, 1856. Should judge it was a month before the close of navigation or thereabouts.

4th. State what you know respecting the condition of the wreck afterwards, how long it laid there, and whether any portion of it remained above water, or whether the whole was submerged.

Ans. The action of the waves during the fall and winter took the deck off of the vessel, washed away her cabin, and imbedded her in the sand so that there was only her stern or stern-post and a few of the heads of her
129 timbers above the water in the spring.

5th. Do you know that any portion of her was visible above the water in the spring? If so, what portion, and how late in the spring it was?

Ans. I know that her stern or stern-post was partly out of the water a foot or two, three feet perhaps; also, that there were a few timber heads or stanchions out of the water at the end next the lake; I think it was there as late as April; the fore part of May I was away; whether it changed during the spring gales I couldn't say; know it was there the first of April.

6th. State whether your business led you at the time into pretty extensive intercourse with those engaged in navigation, and state also what you know as to the notoriety of the fact that the wreck of the McKay still remained in the harbor in the spring of 1857, as late, say, as the first of April.

Ans. My business at that time did lead me among vessel men; I owned a vessel myself; was on the look-out for her; was on the docks, and had
130 a good deal to do with lumber vessels at that time, and think it was generally known by vessels trading here constantly that the wreck of the McKay was still there.

Cross-examination.

Cross-int. 1st. State, if you please, what time navigation commenced in the spring of 1857.

Ans. Navigation usually commences here in March, and did that year.

Cross-int. 2d. State, if you know, how many vessels came in or went out of this port previous to the 27th of March that year.

Ans. I don't know.

Cross-int. 3d. State how many captains and vessel owners, and who they were, that you talked with previous to the 27th of March, about the wreck still being there.

Ans. I can't say that I talked with any one; have no remembrance now.

Cross-int. 4th. State the position of the wreck in the spring of 1857, and where she lay.

131 Ans. The wreck did change in the winter; the end next the lake swung out partly across the channel; should think it moved thirty or forty feet; can't tell exactly; know it was further out in the spring than it was in the fall.

Cross-int. 5th. Which end of the vessel was towards the lake?

Ans. It is my impression that the stem was, but I won't be positive as to that.

Cross-int. 6th. Did you ever see any buoy or flag over her?

Ans. No, sir.

Cross-int. 7th. State what effect the current of the river and the breaking up of the ice in the spring and the back flow upon the pier would have upon the wreck.

Ans. It is my opinion that the current and the action of the sea would have a tendency to undermine the wreck and sink her deeper in the water, and perhaps, by washing away the sand around her, to swing her out further into the river; it might do it.

132 Cross-int. 8th. Did you sail in and out of the port that spring previous to the accident?

Ans. Not previous to the accident to the Huron; I did afterwards.

Cross-int. 9th. How near was your office to the wreck?

Ans. I staid more at Prindivilles's wood yard, near Hugunin's dock, on the north pier, than anywhere else at that time; that is, in 1856 and 1857.

Cross-int. 10th. How were you engaged in March, 1857?

Ans. Part of the time I was attending to my vessel, and part of the time trying to effect the sale of some lumber I was to receive during that season; my vessel was on the North Branch; she sailed the last week in March; my impression is it was after the accident.

Cross-int. 11th. How often during the month of March, 1857, previous to the accident to the Huron were you on the pier?

Ans. My impression is that I was down at Prindiville's nearly every day.

133 Cross-int. 12th. How often during said time did you see the stern or stern-post of the wreck above the water?

Ans. I can't say exactly how often; I recollect seeing it once distinctly; a tug fast to it; had a line over this post hanging to it; she was not trying to pull her out, but merely fastened to it; Prindiville's wood yard was east of Hugunin's docks, on part of the lot now used by the sugar refinery.

Cross-int. 13th. State the name of the tug.

Ans. I don't know.

Cross-i. 14th. State what day of the month it was.

Ans. I don't know.

Cross-int. 15th. Do you know how long this was before the accident?

Ans. I don't know; don't know whether it was before or after the accident.

Cross-i. 16th. State whether the persons on the tug were making soundings around said wreck, or putting signals over her, or what they were doing.

134 Ans. I couldn't see that they were doing anything; it was the end nearest the pier, where the post was out of the water, and to which they were hitched.

EDWARD KELLY.

Subscribed and sworn to before me this 4th day of June, A. D. 1862.
O. K. A. HUTCHINSON, *U. S. Commissioner.*

Deposition of Sidney S. Durfee, taken by consent of parties, before James A. Cowles, esq., on the 13th day of January, 1863.

ALBERT E. GOODRICH *et al.*
vs.
CITY OF CHICAGO.

Deposition of Sidney S. Durfee, called by the defendant.

1st q. What is your name, age, residence, and occupation?

Ans. My name is Sidney S. Durfee; age fifty-nine; idle at present; have been engaged in dredging; formerly harbor master in Chicago, and have also raised a number of sunken vessels.

135 2nd q. Did you know at the time it occurred of the wreck of the schooner McKay near the mouth of the Chicago River, in the fall of 1856?

Ans. Yes, sir.

3d q. What was your business at that time?

Ans. Dredging.

4th q. State whether during that winter and the early spring of 1857 you had much intercourse with people interested in lake navigation here in Chicago.

Ans. I had a general acquaintance with people navigating the lakes.

52. State, if you know, whether the wreck of the McKay, and the fact of her lying in the river, was or not a matter of general notoriety among those engaged in lake navigation, and what are your means of knowledge. State how extensively the fact was known, and whether the libellants, Goodrich & Drew, were or not aware of the existence of the wreck.

(Question objected to as incompetent and immaterial.)

136 Ans. The McKay did not lay in what I consider the river. She lay near the north pier, in the curve beyond the end of the south pier, about 250 to 300 feet easterly of the end of the south pier. It must have been generally known, because she was in sight above water. It must have been known to every man entering or leaving the harbor in the day time until the close of navigation. I do not know individually as it was known to Goodrich & Drew. They were here that fall and engaged in steamboat business. Their office was near the old light-house on River st., about three eighths of a mile from the wreck. I think they both remained here during the winter. I am confident I saw them both frequently during the winter.

6th q. Did you know of the injury to the steamboat Huron in the spring of 1857, occasioned by her running into this wreck?

Ans. I was on board of the Huron the morning after she was sunk.

137 7th. Will you state whether any portion of the McKay was above water that spring at the time of this accident?

Ans. I do not know whether i was or not.

Cross-examined by D. Goodwin, jr.

1. State at what time the McKay sunk.

Ans. I should think the latter part of October.

2. State precisely where she sunk and how she lay.

Ans. It was a trifle beyond the angle of the pier, which is about 200 feet beyond, east, and opposite to the end of the south pier. The stern lay to the westward and lay about 20 feet from the pier. Her bow lay almost east of it. She was, I think, 130 feet long, perhaps. She was a smallish sized schooner. I saw her perhaps every day, or very often, until the close of navigation. Navigation closed some time in December; I don't remember when. I think the position of her laying was not changed any

138 during the fall. Her owners took her spars out, but I think both were not taken out till ice had made.

3. State the names of the persons with whom you talked about the McKay laying sunken at the mouth of the harbor in the winter and early spring, and what means of knowledge you have that it was generally known she was there.

Ans. I don't recollect of any one person in particular with whom I conversed on the subject. She lay there in sight from the time she sunk till the close of navigation. Everybody must have known that she could not get away, but I don't know whether any one knew she was there in the spring or not.

139 Deposition of Orville Olcott, taken at Chicago, Illinois, June 4th, 1862, before O. K. A. Hutchinson, commissioner, on behalf of respondent.

1st. What is your name, age, occupation, and place of residence?

Ans. Orville Olcott; forty-six; shipwright; Chicago.

2nd. Where did you reside in 1857, and what was your business at that time?

Ans. Chicago. Was connected with Mr. Jourdan, owning, occupying, and doing work in ship-yard. Engaged in raising vessels.

Redirect examination.

1st. State whether or not you knew of the wreck of the Jas. McKay, in the fall of 1856, near the mouth of the harbor, and whether the fact was generally known to those engaged in shipping.

Ans. I know of the wreck. I don't remember the time exactly. So

140 far as regards shipwrights, ship carpenters, &c., we all knew it.

Know that from hearing them speak of it. Might have heard others remark that they knew of it. Can't say certain about it.

Cross-ex. resumed.

11th c. i. State whether you knew anything of the wreck McKay in the spring of 1857, before the accident to the Huron.

Ans. I knew that she was wrecked; knew that she was near the north pier; it was said she was there; I did not see her. It was understood she still lay there.

12th c. int. State who said so.

Ans. Could not name any one in particular.

13th c. int. State whether you ever heard any one, in the spring of 1857, before March 27, say that the wreck McKay was still in the river, or what had become of her.

Ans. I can't name any particular time that I heard any one say so.

141 14th cr. int. Were you in the habit of sailing in and out from the harbor?

Ans. I was not.

ORVILLE OLCOTT.

Subscribed and sworn to before me this 4th day of June, A. D. 1862.
O. K. A. HUTCHINSON, *U. S. Commissioner.*

142 Sections 1, 2, 3, 4, 5, 6, 7, 12, 15, and 16 of chapter 31, also section 13 of chapter 39 of Municipal Laws of Chicago, read in evidence in said cause, are in the words and figures following, to wit:

Chapter 31.—*Harbor.—An ordinance concerning the harbor.*

SECTION 1. *Be it ordained by the common council of the city of Chicago,* That there shall be annually appointed by the common council one harbor master and one or more assistants, who shall hold their offices for one year and until the appointment and qualification of their successors. The harbor master shall keep an office in such place as the common council shall designate or provide, where, at all times during the season of navigation, he or his assistants, or one of them, can be found, and where orders can be left that shall receive prompt attention. The harbor master, or his assistants shall be required to pass along so as to see the entire harbor as far up as Lake street at least three times each day, and as far up the South Branch

143 as Twelfth street, and as far up the North Branch as Chicago avenue at least twice each day during the time the harbor is navigable. He and his assistants shall at all times while on duty be required to carry a speaking trumpet, which shall be their badge of office, and through which their orders can be heard at a distance. The harbor master shall be required to keep an accurate account and record of each case of damages to bridges, docks, and all other city property pertaining to the harbor, accruing by any and every breach of the provisions of this ordinance, by any person, vessel, craft, or float, the name of such vessel, craft, or float, the owner, master, or assignee thereof; and it shall be his duty to gather all evidence and information in his power concerning any such breach or breaches forthwith after the occurrence of such breach, to keep an accurate record of the amount of such damage, when, to whom, and how paid, and an account of all claims against the city made by vessel-owners or persons navigating the harbor, for damages sustained in said harbor to vessels and other crafts, and that he be required to make a detailed report

of all such record semi-annually (or oftener if required by the coun-
144 cil) and submit the same to the common council. The harbor master shall have charge of and be responsible for the safe-keeping of the city life-boats and any other property that may be placed in his charge by the common council or the superintendent of public works. He shall perform all the duties required of him by this ordinance or by any resolution of the common council or order of the superintendent of public works. The harbor master and his assistants shall receive a salary of such amount as shall be fixed by the common council.

Sec. 2. The harbor master and his assistants are hereby authorized and required to give such orders and directions relative to the location, change of place or station, manner of moving or use of the harbor of every vessel, craft, or float lying, moving, or laid up in the harbor not in use, as may be necessary to promote good order therein, and the safety and equal convenience of such vessels, crafts, or floats, and any owner, master, or other person having charge of the same, who shall refuse or neglect to obey any such order or direction shall be subject to a penalty of twenty-five dollars for every such neglect or refusal, which penalty shall constitute a
145 lien upon such vessel, craft, or float until fully paid.

Sec. 3. Whenever there shall be in the harbor any vessel, craft, or float insecurely fastened, adrift, sunken, or laid up not in use which may require to be fastened, raised, removed, or its location changed, it shall be the duty of the harbor master or his assistants to notify the owner, master, or other person who may be in charge thereof to secure, raise, or remove such vessel, craft, or float without delay. But if the harbor master or his assistants shall be unable to find the master, owner, or person in charge of such vessel, craft, or float as aforesaid, or if no person answering such description can be found by him or them such notice shall not be required. And any person who shall refuse or neglect to comply with such order or direction shall be subject to a penalty of twenty-five dollars, and the further penalty of ten dollars for every day he or they shall refuse or neglect to observe the same, which penalty shall constitute a lien upon such vessel, craft, or float until fully paid.

Sec. 4. If any vessel, craft, or float shall not be secured, raised, removed, or its location changed in compliance with the direction of the harbor
146 master or his assistants after notice, or if the harbor master and his assistants shall be unable to serve such notice as aforesaid, in either case it shall be his and their duty to cause such vessels, craft, or float to be secured, raised, removed, or its location changed as aforesaid, employing such assistance as may be necessary for the purpose. All expenses which may be incurred in any case shall be recoverable of the owner, consignee, master, or other person having charge of such vessel, craft, or float, and the same expenses are hereby declared to be a lien upon such vessel, craft, or float until fully paid; and if any person shall resist the harbor master, his assistants, or any person acting under him or them in the execution of such duty, or of any duty imposed upon him or them by this ordinance, such person so resisting shall be subject to a fine of not less than ten dollars, and not exceeding one hundred dollars, and may be imprisoned not exceeding thirty days.

Sec. 5. All penalties, fines, damages, and expenses which may be made or become a lien upon any vessel, craft, or float by the provisions hereof, shall attach from the time the right of action may accrue, and the
147 harbor master is hereby authorized and required to detain any vessel, craft, or float subject to such lien, or such parts of her, or of her rigging, anchors, or apparel as shall be sufficient to discharge the same. Such lien, if not otherwise discharged, may be enforced against the vessel, craft,

or float, or other property so detained by an attachment against such vessel, craft, or float, by her or its name, or against the owner or owners thereof, if known, in the manner provided by the laws of this State for the enforcement of maritime claims against boats and vessels. All suits which may be brought under this ordinance, whether in rem or in personam, shall be brought in the name of the city of Chicago; and all the expenses which may be incurred in such detention shall likewise be a lien upon such vessel, craft, or float, and recoverable as a part of the original cause of action. All moneys which may be paid to or collected by the harbor master or his assistants, or which shall be collected in any suit instituted as aforesaid, shall be paid by the officer collecting the same into the city treasury. If any person or persons shall resist the harbor master, his assistant, or any person acting under him or them, in the detention of any vessel, craft, or float, for the purposes aforesaid, he and they shall be subject to a fine of not less
148 than ten dollars and not exceeding one hundred dollars.

SEC. 6. No master, owner, or any person in charge of any vessel, craft, or float shall cause or suffer the same to remain at or within one hundred feet of the south pier for a longer period than is actually necessary to furl sail on coming in or make sail on departing, under a penalty of ten dollars, provided that rafts or vessels necessarily used in the construction or repair of the piers shall not be deemed to be within this provision.

SEC. 7. No vessel, craft, or float shall be so moored or anchored within the harbor, or in any slip or dock, as to prevent the passage of any other vessel, craft, or float, nor shall any vessel, craft, or float be so moved as to run against or injure any bridge across the river, or any branch thereof, under a penalty of not less than ten dollars nor exceeding one hundred dollars to the master, owner, or person in charge thereof.

SEC. 12. All penalties, fines, and damages which may be incurred by the owner, consignee, master, or other person having charge of any ves-
149 sel, craft, or float, under any provision of this ordinance, are hereby declared to be recoverable of and a charge and lien on the vessel, craft, or float of which he may be owner, consignee, master, or in charge, and such lien may be enforced in the same manner as other liens against the same.

SEC. 15. The harbor master and each of his assistants shall, immediately after his election as aforesaid, be appointed by the common council a special police constable for and during the time he may serve as such harbor master or assistant harbor master, who shall exercise the powers and duties incident to the office of constable only in connection with their appointment, and duties of harbor master and assistant harbor masters, and for the purpose of carrying more readily into effect the police regulations of the city concerning the harbor under his charge and to preserve the public peace and quiet in and about said harbor. Each person elected harbor master or assistant harbor master as aforesaid, shall, before he enters upon his duties as such, file in the office of the city clerk, in the penal sum of three thousand dollars,
150 a bond, with two or more sureties, conditioned that he will faithfully discharge and perform the duties of his office required of him by the laws of the city, this ordinance, and the orders of the common council, and that he will well and truly pay, or cause to be paid, to the city of Chicago all moneys which may come into his hands by virtue of his office.

SEC. 16. The words "vessels, crafts, and floats" shall be deemed to include every species of steam and other vessels or boats lying or floating in or navigating the harbor, and also all rafts of logs, timber, wood, lumber, or other floating matter; and the "harbor" shall be deemed to include the Chicago River and its branches, to their respective sources, the piers, and so much of Lake Michigan as lies within the distance of one mile of the shores of the city.

Chapter 39.—*Nuisances.*

Sec. 13. If any vessel, wreck, or hull of any vessel, craft, or float, sunken in the harbor, shall be suffered to remain sunken therein, after notice to the owner thereof, or his agent, by the harbor master, to raise or remove the same; or if no owner or agent of the same can be found, in either case such vessel, wreck, or hull, shall be deemed a nuisance, and may be raised
151 and removed to any place without the harbor, in the discretion of the common council or mayor, and the expenses thereof shall be a lien and charge upon the same, and may be collected in the manner provided in the ordinance concerning the harbor.

152 And afterwards, to wit, on the 1st day of July, A. D. 1863, in the record of the proceedings of said court, in said cause, is the following entry, to wit:

Albert E. Goodrich *et al.*
vs.
The City of Chicago. } Libel.

The court having fully considered and being fully advised of the matters herein submitted, pronounces for the libellants.

And afterwards, to wit, on Thursday, the 23d day of July, A. D. 1863, in the record of the proceedings of said court, in said cause, is the following entry, to wit:

Albert E. Goodrich *et al.*
v.
The City of Chicago. } Libel.

This cause having been heretofore heard on the pleadings and proofs, and the court having pronounced for the libellants, it is hereby ordered that it be referred to a commissioner of this court, to take testimony as to the damages to the libellants, and to report the same to this court with all convenient speed as ascertained by him, together with his opinion upon the
153 same.

And afterwards, to wit, on Tuesday, the 29th day of September, 1863, in the record of the proceedings of said court, in said cause, is the following entry, to wit:

Albert E. Goodrich and George C. Drew
v.
The City of Chicago. } Libel.

The court having heretofore pronounced for the libellants, and referred it to one of the masters to report their damages, now come the parties, by their proctors, and upon proof filed they waive the report from the master, and by agreement submit the question of the libellants' damages to the court; and the court, after hearing the evidence and the arguments of the advocates of the respective parties, not being now sufficiently advised in the premises, takes time to consider.

And afterwards, to wit, on Wednesday, the 30th day of September, A. D. 1863, in the record of the proceedings of the said court, in said cause,
154 is the following entry, to wit:

Albert E. Goodrich and George C. Drew
v.
The City of Chicago. } Libel.

Now come the parties, by their proctors, and the court having fully con-

sidered, and being now fully advised upon the matter of the libellants' damages heretofore submitted, finds and assess the libellants' damages in the sum of thirteen thousand three hundred and twenty-eight dollars.

It is thereupon considered by the court that the respondent pay to the libellants the said sum of thirteen thousand three hundred and twenty-eight dollars, the damages aforesaid, together with the costs and charges to be taxed, and that they have execution therefor. And thereupon the respondent prays an appeal to the circuit court.

And afterwards, to wit, on the 3d day of October, A. D. 1863, the following stipulation was filed in the office of the clerk of said court, to wit:

Stipulation as to record.

155 United States district court for the northern district of Illinois, in admiralty.

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
THE CITY OF CHICAGO.

It is hereby agreed and stipulated by and between the proctors in said cause that the record to be transmitted to the circuit court on appeal, need not contain the testimony and exhibits in said cause touching only the damages to be decreed to the libellants, both parties to said cause being satisfied with the decree of the district court so far as the amount of damages is concerned. And it is agreed that if the court of appeal are of opinion that the respondent (the city of Chicago) is liable, as is alleged by said libellants, that then the decree of the said district court in favor of said libellants for the sum of thirteen thousand three hundred and twenty-eight dollars and costs, shall be confirmed, subject to the right of appeal to the supreme court. It is also agreed that the respondent may file the bond of the city of Chicago for the appeal, and that no security upon said bond shall be required,
156 the proctors for the libellants hereby waiving the right to such security.

GOODWIN, LARNED & GOODWIN,
Proctors for Libellants.
B. F. AYER, *Proctor for Respondent.*

Chicago, October 3d, 1863.

Endorsed: Filed Oct. 3d, 1863.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 7th day of October, A. D. 1863, the respondent, the city of Chicago, by its proctor, came and filed a notice in appeal, appeal, and appeal bond, which read in the words and figures following, to wit:

Notice of appeal.

District court of the United States for the northern district of Illinois, in admiralty.

ALBERT E. GOODRICH AND GEORGE C. DREW, libellants,
v.
THE CITY OF CHICAGO, respondent.

157 The above-named respondent, conceiving itself aggrieved by the final sentence or decree, entered on the 30th day of September, A. D. 1863, in the above-entitled cause, doth appeal therefrom to the next circuit court of the United States to be held in and for the said district, and it prays

that this its appeal may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the said circuit court.

B. F. AYER, *Proctor for Respondent.*

Chicago, Oct. 15th, 1863.

We hereby acknowledge notice of the above appeal, and waive any further service of notice upon the libellants.

GOODWIN, LARNED & GOODWIN,
Proctors for Libellants.

Endorsed: Filed Oct. 7, 1863.

WM. H. BRADLEY, *Clk.*

Petition in appeal.

Circuit court of the United States for the northern district of Illinois.

THE CITY OF CHICAGO, appellant,
v.
158 ALBERT E. GOODRICH AND GEORGE C. DREW, appellees.

The petition of appeal of the above-named appellant respectfully showeth that a decree was lately made in the district court of the United States for the northern district of Illinois, bearing date the thirtieth day of September, A. D. 1863, in a certain cause of admiralty and maritime jurisdiction pending in the said court, wherein the above-named Albert E. Goodrich and George C. Drew were libellants, and the above-named city of Chicago was respondent, in and by which said decree it was, among other things, ordered, adjudged, and decreed that the libellants in said cause recover against this appellant their damages for the cause set forth in said libel, to the amount of thirteen thousand three hundred and twenty-eight dollars. And this appellant is advised and insists that the said decree is erroneous, inasmuch as the said libellants were not entitled to any damages in the premises. And

159 this appellant, for this and other reasons, appeals from the whole of said decree in favor of the said Albert E. Goodrich and George C. Drew, to the next circuit court to be held in the said district, and on the said appeal it intends to have said cause heard anew in the circuit court on the pleadings and proofs in the district court and other proofs to be introduced in the said circuit court. And it prays that the said decree and every part thereof may be reversed with costs, and that such other decree may be made by this court as shall be agreeable to equity and good conscience, and that the appellees may be condemned to pay to the appellants their costs and damages in the premises.

B. F. AYER,
Proctor and Advocate for Respondent.

Endorsed: Filed Oct. 7, 1863.

WM. H. BRADLEY, *Clk.*

Appeal bond.

District court of the United States for the northern district of Illinois, in admiralty.

ALBERT E. GOODRICH AND GEORGE C. DREW, libellants,
v.
THE CITY OF CHICAGO, libellee.

160 Know all men by these presents that the city of Chicago is held

and firmly bound unto Albert E. Goodrich and George C. Drew in the sum of twenty-seven thousand dollars, to be paid to the said Albert E. Goodrich and George C. Drew, their executors, administrators, or assigns, to which payment, well and truly to be made, the said city of Chicago binds itself firmly by these presents. Dated this sixth day of October, in the year of our Lord 1863.

The condition of the above obligation is such that, whereas the above bounden city of Chicago has appealed to the circuit court of the United States for the northern district of Illinois, from a decree of the district court of the United States for the said district, bearing date the thirtieth day of September, A. D. 1863, in a cause in which the said Albert E. Goodrich and George C. Drew were libellants and the said city of Chicago was respondent:

Now, therefore, if the above-named appellant (the city of Chicago) shall prosecute its appeal with effect and pay all such costs and damages as shall be awarded against it as such appellant therein, then this obligation to be void; otherwise, to remain in full force and effect.

161 F. C. SHERMAN, *Mayor.*

[SEAL.] S. S. HAYS, *Comptroller.*

Attest: H. W. ZIMMERMAN, *City Clerk.*

Endorsed: Filed Oct. 7, 1863.

WM. H. BRADLEY, *Clk.*

162 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that the foregoing to be a true transcript of the record of said court, in the case of Albert E. Goodrich and George C. Drew, libellants, the city of Chicago, respondent, made under the stipulation of the parties by their respective proctors, and pursuant to the fifty-third rule of the supreme court, adopted at the December term thereof, A. D. 1854.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in Chicago, this 9th day of Oct., A. D. 1863, and of our independence the 88th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

163 On this day, to wit, the 13th day of October, in the adjourned October term, A. D. 1863, of said circuit court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
THE CITY OF CHICAGO. } Appeal.

Now come the parties, by their proctors, and thereupon this cause is set down for hearing, and after progressing in the hearing until the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

On this day, to wit, the 14th day of October, in said October term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
v.
THE CITY OF CHICAGO. } Appeal.

Now come again the parties, by their proctors, and the court after hearing the conclusion of the argument of advocates, take said cause
164 under advisement.

On this day, to wit, the 15th day of July, in the July term, A. D. 1864, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW
vs.
THE CITY OF CHICAGO. } Appeal.

Now come the parties, by their proctors, and the court having fully considered and being now fully advised upon the matters submitted herein, it is considered by the court that the decree of the district court rendered herein be reversed, and the libel herein be dismissed at the costs of the libellant, and that the respondent do have and recover of and from the libellants and A. Wallingford, their stipulator, its costs and charges by it in this behalf expended, together with its costs in the court below, amounting to the sum of dollars and cents, and that it have execution therefor.

And the libellants, by their proctors, give notice of an appeal of this cause to the Supreme Court of the United States.

165 On the same day, to wit, the 15th day of July, A. D. 1864, came said parties, by their proctors, and filed in said clerk's office their stipulation in said entitled cause in the words and figures following, to wit:

In admiralty, 8th circuit, N. D. Ill.

ALBERT E. GOODRICH AND GEORGE C. DREW
vs.
THE CITY OF CHICAGO. } On appeal before Judge Davis.

The decree of the district court in this cause having been reversed by his honor Judge Davis, on appeal, and the libel ordered dismissed, and a notice of appeal having been entered in open court on behalf of the libellants, it is agreed between the proctors and solicitors for the respective parties that all proceedings may rest until the fifteenth day of September next, when the appeal may be perfected as of this date and with the same force and effect as if now complete, without prejudice by the delay.

Dated July 15th, 1864.

B. F. AYER, *Proctor for Respondent.*
GOODWIN, LARNED & GOODWIN,
Proctors for Libellants.

166 Endorsed: Filed July 15th, 1864.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 16th day of July, A. D. 1864, came said libellants, by their proctors, and filed in said clerk's office their appeal and appeal bond in said entitled cause in the words and figures following, to wit:

ALBERT E. GOODRICH AND GEORGE C. DREW, libellants and appellants
vs.
THE CITY OF CHICAGO, respondent.

To the honorable the Supreme Court of the United States:

The appeal of Albert E. Goodrich and George C. Drew, the above-named libellants and appellants, respectfully showeth that on the nineteenth day of October, eighteen hundred and sixty-one, the above-named libellants filed their libel in the district court of the United States for the northern district of Illinois, against the City of Chicago in a cause, civil and maritime, for the recovery of damages alleged to have been sustained by them to the

steamboat Huron, by running upon a sunken vessel in the Chicago River, which the said city of Chicago was bound to remove, but had ne-
167 glected to remove, whereby said steamboat Huron was sunk and wrecked, and that the said city of Chicago was cited to appear upon process issued upon said libel and filed an answer to said libel, and such proceedings were had in the said cause that on the thirteenth day of September, A. D. 1863, a final decree was made and pronounced therein by the said district court, wherein it was in substance adjudged that the said libellants recover against the said city of Chicago the sum of thirteen thousand three hundred and twenty-eight dollars, together with costs. And that after such final decree the city of Chicago, respondent, duly appealed therefrom to the circuit court of the United States for the northern district of Illinois, and the said cause was removed thereby into the said circuit court and there tried anew, and such proceedings were had in the said circuit court that afterwards, on the fifteenth day of July, A. D. 1864, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be in all things reversed and the libel be dismissed with costs, and that the said city of Chicago have execution therefor. Which said decree of the said circuit court is, as these
168 appellants are advised erroneous and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court and the libel, answer, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay,and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made affirming the said decree of the said district court, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated Chicago, July 16th, 1864.

ALBERT E. GOODRICH.
GEORGE C. DREW.

GOODWIN, LARNED & GOODWIN,
Proctors and Advocates for Appellants.

Endorsed: Filed July 16th, 1864.

WM. H. BRADLEY, *Clerk.*

169 Circuit court of the United States for the northern district of Illinois.

ALBERT E. GOODRICH AND GEORGE C. DREW, appellants,
vs.
THE CITY OF CHICAGO, appellee.

Know all men by these presents that we, Albert E. Goodrich and Daniel Goodwin, jr., of Chicago, Illinois, are held and firmly bound unto the above-named city of Chicago in the sum of one thousand dollars, to be paid to the said appellee, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the sixteenth day of July, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named Albert E. Goodrich and George C. Drew have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the
170 above-named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

A. E. GOODRICH. [SEAL.]
DANIEL GOODWIN, JR. [SEAL.]

Sealed and delivered, taken and acknowledged this sixteenth day of July, 1864, before me.

P. A. HOYNE. *U. S. Com. N. D. Ill.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Albert E. Goodrich and Daniel Goodwin, jr., being duly sworn, depose and say, and each for himself says, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

A. E. GOODRICH.
DANIEL GOODWIN, JR.

Sworn to this 16th day of July, A. D. 1864, before me.
P. A. HOYNE, *U. S. Com. N. D. Ill.*

I approve the above bond and the sufficiency of the sureties thereto.
THOMAS DRUMMOND.

Endorsed: Filed July 16th, 1864.
WM. H. BRADLEY, *Clk.*

171 On this day, to wit, the 14th day of September, A. D. 1864, said libellants filed in said clerk's office their citation in said cause, which is in the words and figures following, to wit:

By the Honorable Thomas Drummond, one of the judges of the circuit court of the United States for the northern district of Illinois, in the eighth circuit, to the city of Chicago.

Whereas Albert E. Goodrich and George C. Drew have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern district of Illinois, made in favor of you, the said city of Chicago, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the fifth day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Chicago, in the northern district of Illinois, in the eighth circuit, the sixteenth day of July, in the year of
172 our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

THOMAS DRUMMOND.

I hereby admit personal service upon me as the attorney and agent of the city of Chicago, of a copy of the appeal and a copy of the citation filed in this cause with the clerk of the circuit court, in and for the northern district of Illinois, on the sixteenth day of July, A. D. 1864.

B. F. AYER,
Counsel to the Corporation.

Endorsed: Filed Sept. 14, 1864.
WM. H. BRADLEY, *Clk.*

173 On this day, to wit, the 20th day of October, A. D. 1864, came said parties, by their proctors, and filed in said clerk's office their stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

United States circuit court for the northern district of Illinois.

ALBERT E. GOODRICH AND GEORGE C. DREW, libellants,
vs.
THE CITY OF CHICAGO, respondent.

It is hereby agreed and stipulated by and between the proctors in said cause that the record to be transmitted to the Supreme Court of the United States on appeal need not contain the testimony and exhibits in said cause touching only the damages to be decreed to the libellants, and that any omission in the record of this cause in the evidence or exhibits touching merely the said question of damages are hereby mutually waived by the respective parties hereto.

It is also agreed that the original map, marked Exhibit A, may be
174 removed from the said circuit court and be attached to the record to be transmitted to said Supreme Court.

It is also further agreed that the charter of the city of Chicago in force in March, 1857, may be referred to and read by either party on the hearing of this cause in the Supreme Court.

It is also further stipulated that the following provisions of the city ordinances, in force March, 1857, which were read in evidence upon the trial of this cause in the circuit court, shall be made a part of the record, to be transmitted to the Supreme Court, to wit, sec's 1, 2, 3, 4, 5, 6, 7, 12, 15, and 16 of chapter 31 of Municipal Laws of Chicago, the same being an ordinance concerning the harbor; also sec. 13 of chapter 39 of said Municipal Laws, the same being an ordinance concerning nuisances.

And it is also further admitted by the proctor for the respondent that the steamer Huron was duly enrolled and licensed, as alleged in the libel in this cause.

Oct. 19, 1864.

GOODWIN, LARNED & GOODWIN,
Proctors for Libellants.
B. F. AYER, *Proctor for Respondent.*

Endorsed: Filed Oct. 20th, 1864.

WM. H. BRADLEY, *Clk.*

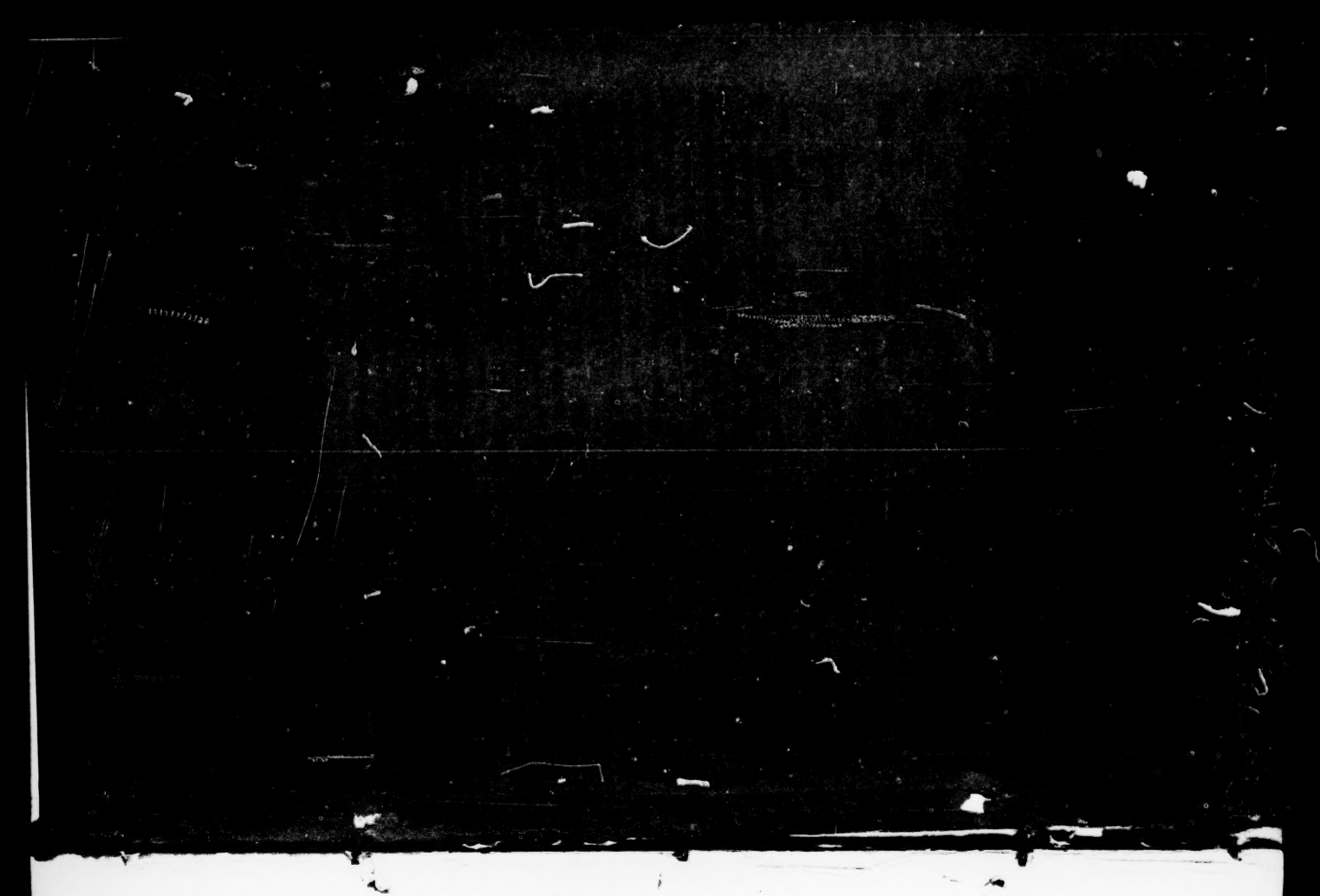
175 (Here follows map, page 175.)

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Wm. H. Bradley, clerk of the circuit court of the United States within and for said northern district of Illinois, do hereby certify the foregoing transcript, from page one to page one hundred and seventy-four, inclusive, to be a true, full, and perfect copy from the record of all the proceedings which have been had in said court in said cause, (except a portion of the testimony omitted under the stipulation of the proctors of the respective parties, on pages 173 and 174 of this transcript,) of Albert E. Goodrich and George C. Drew against the city of Chicago, as the same now remains in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said northern district of Illinois, this thirtieth day of November, A. D. 1864.

WILLIAM H. BRADLEY, *Clerk.*



Supreme Court of the United States.

ALBERT E. GOODRICH AND
GEORGE C. DREW,
Appellants,

vs.

THE CITY OF CHICAGO,
Respondent.

Additional Argument for Appellants.

SINCE the foregoing argument was prepared, a decision has been made by the Supreme Court of Illinois, in the case of City of Joliet *vs.* Verley, which has not yet been published, but of which a manuscript copy, made from the printed sheets of the report in the hands of the publisher, will be herewith submitted to this Court. This decision, we think, fully sustains the view presented in the previous argument of the meaning and effect of the decision of the same Court in the case of Goodrich & Drew *vs.* The City of Chicago, (20 Ill. 445.)

In the case of City of Joliet *vs.* Verley, the action was brought to recover damages for injuries received by the plaintiff from falling from a sidewalk near the bridge over the Illinois and

Michigan Canal, at Joliet. It appeared that the bridge in question was one which was constructed not by the City of Joliet, but by the Canal Trustees, and was, originally, exclusively under their care. It was, however, used by the citizens, and subsequently the City, without objection by the Trustees, built passage-ways connecting the sidewalks of the bridge with the sidewalks of the street. The accident occurred in consequence of the walk being out of repair, and of there being no railing by the side of this walk at a point where a person slipping was liable o be p recipitated over the bank of the canal. It does not appear that there had ever been any railing at this place before the City built the cross-walk.

Judge Beckwith, (who it may be remarked was Counsel for the City in the case of Goodrich & Drew *vs.* City above mentioned), in giving the opinion of the Court, said :

"The Canal Trustees built a bridge across the Illinois and Michigan Canal, within the corporate limits of the City of Joliet, over which all persons were allowed to pass and repass at pleasure. The Canal Trustees could not, by building a bridge impose on the City the duty of keeping it in repair. The legal obligation of a city to repair highways, streets, sidewalks, and bridges, within its corporate limits, is one voluntarily assumed by its corporate authorities, and relates to such as are opened or constructed under its authority, *and those which its officers assume control over for that purpose. Until the City assumes control over a bridge erected without its assent or authority it is not liable for its not being kept in repair.* The City was under no obligation to make approaches to the bridge for the convenience of its citizens;—the obligation in this respect was the same as in relation to repairing *new* streets and building market-houses, &c.

"Cities are under a *political* obligation to open such streets and build such market-houses as the convenience of the community requires, but Courts cannot compel the performance of such duties or hold them responsible for their non-performance."

The reasoning of this decision throws light upon the real meaning of the opinion of the Court given in the case of Goodrich & Drew, *vs.* City, above referred to.

It is obvious that the Court in that case regarded the duty of undertaking the removal of any *wreck or other obstruction* in the Chicago Harbor, by the city, as a *political* obligation—resting on the same grounds as their duty of opening new streets, or building new bridges, &c.; and one therefore which was to be "voluntarily assumed by the corporate authorities or not," at their pleasure, and which could not be enforced by the Courts; and that the mere creation, by ordinance, of the needful officers and means to enable the city to undertake such work where it chose so to do, did not of itself create any legal liability for not undertaking such work in any case.

But the further principle is clearly set forth that the liability of the City for non-repair or negligence, does apply to any street which has been opened under the authority of the City, or over which the City has "*assumed control*" for the purposes of such repairs.

The liability is made by the principles established in the decision in the Joliet case to depend, not on the question whether the acts done by the City at any particular time were *beneficial* or otherwise, but on the question whether or not the City had *assumed control* of the street or bridge, either by having originally authorized its construction, or by subsequently assuming control over it, in fact. "This liability," say the Court, extends "to such streets as are constructed under the authority of the City, *and also to those which its City officers assume control over for that purpose.*"

The City were held in the Joliet case as not bound to have assumed any control over the bridge, or to have made any repairs thereon, *ab initio*, but to have become liable in consequence of their subsequently voluntarily assuming control over the same for that purpose.

The principles stated in the Joliet case, applied to the case before this Court, relieve every difficulty and objection to the Plaintiffs' recovering, which have been supposed to arise out of the previous decision of Goodrich & Drew *vs.* City of Chicago, above referred to.

The obligation to remove wrecks in general, being a political one, which it was in the option of the City to assume or not, a declaration setting forth (as in that case) merely the omission, or refusal of the City to undertake such duty, although it also set forth the ordinances providing the needful officers and means for the performance of such work, would, in view of the principles set forth in that decision, and in the more recent case of City of Joliet *vs.* Verley, above cited, contain no legal ground of action, and a general demurrer to such declaration might, on these grounds, be sustained.

But there would be nothing in such decision to prevent or lessen the liability of the City in cases where the City did assume to remove any particular wreck, or did undertake or enter upon the work of its removal.

In such case, they become liable from the moment they enter upon and assume such removal. In the case of the Joliet bridge, they were not liable, *ab initio*, to keep it in repair, and became so only in consequence of their voluntary act in assuming to repair it. Suppose when they first assumed to repair this bridge, they had removed one or more rotten planks from the bridge, but left

others equally defective, and a passenger had suffered injury from the giving way of the rotten planks which were left. In such case, the liability of the City to respond in damages is fully established by the decision. But it might have been urged in that case, with the same plausibility as in this, "that the City were under no obligation" to repair this bridge; that their going upon the bridge and removing some of the rotten planks was an "act which was gratuitous, and if productive of no mischief, could impose no legal obligation where none existed before;" that the City made the bridge no worse than it was before, but in fact made it better; that "their act was not wrongful, and not the cause of the injury," and if not bound to repair the bridge, *ab initio*, it could not be made laible in such case.

But the opinion of the Court furnishes the answer to such reasoning by fixing the absolute liability to repair the bridge upon the City, by reason of its entering upon it, and "assuming control over it for that purpose," and holds that it is subject to the same liabilities in such cases as in cases where the bridge or street so out of repair was originally constructed by the authority of the City.

And so in the case at bar. Although the obligation to remove this or any other particular wreck, or obstruction, from the harbor, was a political one, and could not be enforced—it resting entirely in the voluntary election of the City whether it would act in any particular case or not, in the same manner as it was left wholly to its election whether to open a *new* street or to assume control over one opened by other parties—yet, the moment the city officers made such election, and entered upon and assumed control over any wreck, for the purpose of removal, the City at once, *ipso facto*, became liable for any omission or neglect in the performance of the duty so assumed, by which any person suffered injury.

In view, then, of the ruling of this same Supreme Court of of Illinois, in Browning *vs.* City of Springfield, (*supra*) where non-repair of streets is made a ground of liability; and of the Joliet case, above cited, where non-repair of streets or bridges not opened or constructed under the authority of the City, is not deemed to give a cause of action, but such liability is allowed to exist as to any such streets, where the City "*has assumed control over them*" *for repair*, we may certainly claim with entire confidence that the case of Goodrich & Drew *vs.* City fully sustains the construction we put upon it, and that the plaintiffs admitted case upon the merits, can be allowed to prevail, and justice be done to them without at. all impugning or abridging the full force and effect of that decision.

GOODWIN & LARNED,

Of Counsel for Appellants.

Supreme Court of the United States.

ALBERT E. GOODRICH AND
GEORGE C. DREW,
Appellants,
vs.
THE CITY OF CHICAGO,
Respondent.

POINTS AND BRIEF FOR APPELLANTS.

THIS was a Libel filed in the District Court for the Northern District of Illinois, before The Hon. THOMAS DRUMMOND, District Judge, in a cause of damage, civil and maritime, against THE CITY OF CHICAGO, *in personam.*

The Libel alleges that Goodrich & Drew were the owners of the steamboat Huron, and that said steamboat was duly enrolled and licensed, and employed in navigating the lakes pursuant to law; that on the 27th of March, 1857, said steamboat, while leaving the port of Chicago, ran against a sunken wreck at or near the mouth of the Chicago river, and inside of the North pier, and was sunk, by which her owners sustained damage; that prior to said damage, said city had been vested with exclusive jurisdiction and control over said river and harbor as a common public navigable river and highway,

by the State of Illinois, and with all the necessary means to provide funds for defraying the expenses incident thereto; that said city accepted the Act of the Legislature, and have ever since assumed and exercised the exclusive care, management, jurisdiction and control over the said Chicago harbor, and have levied taxes and passed ordinances for that purpose; that on the 20th day of May, 1856, the city passed an ordinance for the removal, without delay, of any obstruction to the free navigation of said harbor, by which it was ordained that whenever there shall be in the harbor any vessel, craft or float insecurely fastened, adrift, sunken, &c., and which may require to be fastened, raised, &c., IT SHALL BE THE DUTY of the harbor master or his assistants, (not finding the owner) to secure, raise or remove such vessel, craft or float WITHOUT DELAY; *that in April*, 1856, *said city appointed William A. Ingalls harbor master of said Chicago harbor, under said ordinance, and at the time of said damage he was such harbor master, vested with full control and management of the harbor, and it was his duty, as agent of the said respondent, to remove all such obstructions to the free and safe navigation of said harbor;* that on the 1st day of November, 1856, a schooner called the James McKay was sunk in said harbor, near the mouth of the river, and inside of the North pier, and became an obstruction to the free and safe navigation of the river; *that the city assumed the exclusive right to remove the same, and did, by their said harbor master, William A. Ingalls, undertake and commence the removal of the said sunken wreck or hulk McKay, by hitching thereto a steam-tug, the McQueen, and thereby attempting to raise and remove the same as they of right ought to do, and in truth and in fact were bound to do, but they did not complete the work, nor raise and remove said sunken wreck or hulk as they had exclusively assumed and undertaken to do, but worked on the said sunken vessel, endeavoring to raise the same, and pulled several pieces of timber from said vessel in the attempt to raise and remove*

her, but without raising or removing the same, did (as Libellants believe) loosen the said vessel in its bed; and negligently and carelessly left said sunken vessel until the 29th day of March, 1857, *by means whereof during that time, by the action of the winds and currents, said wreck became drifted further into the channel of the river the space of forty feet, and during all the time aforesaid was kept in the channel of said river by the Respondent under water, so that the same could not be seen;* and without fixing or placing any buoy or signal to mark the place of said sunken wreck; and that in consequence of the negligence of the city the said steamboat Huron ran on to said sunken wreck and was sunk, in ignorance of its locality and without fault on her part, with damage to the Libellants of $19,487.50.

The Respondent answered and alleged substantially,

First. Want of jurisdiction in this Court.

Second. That the city is not liable on the facts of the case, nor was it under any legal obligation to remove said sunken vessel.

Third. That the accident occurred through the carelessness and unskillful conduct of the Huron, her master and crew.

Fourth. A former judgment on demurrer to the declaration, in an action on the case between the same parties in the Supreme Court of Illinois, as a bar to this action.

The case was heard on the pleadings and proofs before the District Judge, who held that the Court had jurisdiction, that the Respondent was liable; that there was no fault on the part of the owners, master or crew of the Huron, and a final decree was entered for the Libellants for the sum of $13,328 and costs. From this decree the Respondent appealed to the Circuit Court,

with a stipulation (Record, Fol. 155) that if the decree should be confirmed it should be for the same damages found by the District Judge below. His Honor, Judge Davis, before whom the appeal was heard, after argument reversed the Decree of the District Court, and ordered the Libel dismissed with costs. From this decree the Libellants appeal to this Court.

The amount of damages found by the District Court being acquiesced in, the testimony in regard thereto is by agreement excluded from the Record. (Fol. 173).

I.

The jurisdiction of the Admiralty Court to entertain this Libel, and grant the relief asked for, is settled in *The Phil., Wil. & Balt. R. R. Co. vs. Phil. & Hav. de Grace S. T. Co.*, (23 Howard 215), where it was held that "the jurisdiction of "Courts of Admiralty in torts depends entirely on locality, and "this Court has heretofore decided that it extends to places "within the body of a County. The term 'torts' includes "wrongs suffered in consequence of the negligence or malfeas- "ance of others, where the remedy at common law is by an "action on the case."

It was accordingly determined in that case that where a railroad company employed contractors to build a bridge, and for that purpose to drive piles in a river, and owing to the abandonment of the contract the piles were left in the river in such a condition as to injure a vessel when sailing on her course, the railroad company was responsible for the injury on a Libel filed in Admiralty.

This case was followed in *The Propeller Commerce*, (1 Black's R. 574), (where the torts occurred on the Hudson river within the body of a county), and the cases referred to by

Judge Clifford, *Waring vs. Clarke* (5 How. 452); *The Genesee Chief*, (12 How. 443); *The Magnolia*, (20 How. 298), and 23 How. *supra*, as decisive upon the point and precluding any "extended argument upon the subject."

II.

The liability of the Respondent, upon the state of facts disclosed in this Record, is demonstrable upon the clearest grounds of principle and recognized authority.

The answer of the Respondent admits that the Chicago river is a public highway within the City of Chicago, for all persons to pass and repass by boats, steamboats and vessels, at their free will and pleasure, subject to such reasonable regulations as the city may, under the authority derived from the Legislature of the State of Illinois, lawfully impose. (Record, Fol. 16).

The charter of the city in force in March 1857, is made part of this case, (Fol. 174) and the ordinances passed under it by the city, regulating and controlling the navigation of the river, are returned as a part of the Record. (Fols. 142 to 152.)

The law has supplied the city with pecuniary means, and armed it with coercive power, to meet and sustain such responsibility of keeping its harbor clear, as it shall from time to time assume and take under its charter.

It has, indeed, as ~~described~~ decided by the Supreme Court of Illinois, in the case of *Goodrich vs. The City*, (20 Ill. 445), a discretion and election as to when and under what circumstances it will exercise the various powers conferred upon it, to remove obstructions from its harbor, and straighten, widen and deepen the same; but the extent of the power is unquestionable.

The specific power is given the city to remove obstructions from the harbor as a matter of public law.

Vide Municipal Laws of Chicago, Sec. 53, *p.* 25, *and Sec.* 33, *p.* 23.

Power is there given "To preserve the harbor; to prevent "any act in relation thereto, tending to fill up or obstruct the "same; to prevent and punish the casting or depositing therein "any earth, ashes or other substance, filth, logs or floating "matter; to prevent and remove all obstructions therein, and "to punish the authors thereof."

And by *Sec.* 4, *Art.* 2, *p.* 19, "To remove all obstructions "in the waters which are *public highways* in said city, and to "widen, straighten and deepen the same;" and by *Sec.* 33, *p.* 23, "to remove and abate all nuisances."

In the following sections, means are provided by the charter to enable the city to exercise the power conferred:

Sec. 53, p. 25; Sec. 63, p. 27; Chap. V., Sec. 1, p. 28; Sec. 11, p. 41; Secs. 1, 3, 4 and 5, p. 253, and Sec. 13, p. 307.

Chapter 31, p. 253–4 and 5 of the ordinances as contained in the Record, (Fols. 142 to 153) *in haec verba*, provides for a harbor master; and these ordinances prescribe his duties. They prescribe the course of proceeding when any vessel is sunk in the harbor. They authorize the harbor master, after notice, (to the owner if found), to remove the sunken vessel, and prescribe that all expenses incurred shall be recoverable of the owner, consignee, master, or other person having charge of such vessel, and that such expenses shall be and remain a lien on such vessel until paid. They authorize the detention of the vessel to enforce payment.

They provide that all suits under the ordinance, whether *in rem* or *in personam*, shall be brought in the name of The City of Chicago;

That all moneys which shall be collected in such suits shall be paid into the City Treasury.

The power of taxation of 3½ mills on the assessed value of all the real and personal estate in the city, for the contingent and other expenses of the city, is found on p. 28.

On p. 20, Sec. 10, is the power to license and tax auctioneers and other dealers; Sec. 9, Hacks and Carriages; Sec. 7, Grocers, &c.

The power to remove all obstructions from the river being thus conferred upon the city by its charter, and ample means placed within its reach to provide for exercising such power, the city did, in this case, enter upon and assume to perform the power so conferred, in relation to this sunken wreck, the James McKay.

The charter of the city (Municipal Laws, p. 26) defines the outside limits of the harbor, viz: "The harbor of the city "shall include the piers, and so much of Lake Michigan as "lies within the distance of one mile into the lake, and the "Chicago river and its branches to their respective sources."

By the ordinances before referred to, (Fols. 142 to 152), the city provided for the regulation, control and management, through the office of a harbor master called into being by its fiat, of so much of the harbor as said ordinances specified. They required the person appointed as that officer "to see the "entire harbor as far up as Lake street, at least three times "each day, and as far up the South branch as Twelfth street, "and as far up the North branch as Chicago avenue, at least

"twice each day during the time the harbor is navigable." He is to keep a record of all damages done to the bridges, docks and other city property pertaining to the harbor, by vessels or their owners, "*and an account of all claims against* "*the city made by vessel owners or persons navigating the* "*harbor, for damage sustained in said harbor to vessels and* "*other craft,*" thus claiming and recognizing the reciprocal right and obligation to collect the one, and its liability to pay the other, upon its accepting and acting upon the power and jurisdiction conferred upon it by the Legislature. By Sec. 4 of such ordinances it is expressly enacted, that if any such sunken vessel or craft should not be raised or removed, in compliance with the direction of its harbor master or his assistants, "IT SHALL BE HIS AND THEIR DUTY *to cause such* "*vessels, craft, or float to be secured, raised, removed, or its* "*location changed as aforesaid,* EMPLOYING SUCH ASSISTANCE "AS MAY BE NECESSARY FOR THE PURPOSE."

Following out this legislation, the city, in the Spring of 1856, appointed William A. Ingalls harbor master, at a salary of $1,500 per annum. He received from them posters containing copies of the ordinances before referred to, *as their instructions to their authorized agent*, and which, construed even in the most limited sense, must be deemed an authority for him to remove such obstructions as he should consider dangerous to navigation. As such agent for the city, he took control of the navigation of the harbor. He says (see his testimony, pages 13, 14 and 15) that to remove obstructions from the river and branches was among his duties, and accordingly, that he did in that year remove the bottom of the steamer Oregon and two canal boats as sunken wrecks.

He was advised of the wreck McKay. As such harbor master, he elected and commenced to remove the McKay in November, 1856. He employed Capt. John Prindiville, with

the tug McQueen, to go with him and try to tow her out. They hitched on to the McKay with a hawser, first to one of her timber-heads, and tore it out; then on to her stern, and parted the hawser; and then again, and parted the hawser a second time, and then discontinued it for a time. He says he could have removed the McKay, with proper materials, in two or three days of good weather, and perhaps less, at an expense of $150. The McKay then lay about thirty-eight feet from the North pier, stern up stream and bow pointing down stream, east north-east, with a portion of her starboard side, rail and stanchion above water. He was harbor master until the middle of March, 1857. The wreck was not visible in the Spring; no part of her above water, and no signal was put over her by the city to show where she was.

The city appointed Henry Fuller harbor master, March, 1857, before the accident to the Huron. He was on the spot in the Spring. No part of the McKay was above water. She then lay in a diagonal direction across the river, with her bow seventy or a hundred feet from the North pier. No buoy or signal had been placed over her. (Fuller, Fols. 53 and 54.)

Capt. Prindiville says the McKay could easily have been removed in the Fall of 1856, with a good ten-inch hawser. He was employed by Ingalls, the city harbor master, to remove her—worked at her from one to three hours, at $10 per hour, with an old six-inch hawser—hitched to her and pulled—couldn't apply a quarter of his power—failed and left her where she was. Four or five days after, her position had been changed by a storm, and she had drifted further out into the river. (Prindiville, Fols. 59 and 60.)

L. C. Hugunin, deputy harbor master in 1857, under Fuller, says that he sounded around the McKay a week after the accident to the Huron, and still the city left her without any

signal over her, and that it was only when Packard & Co. commenced moving the wreck that a buoy or flag was placed over her.

After the accident, and before the city placed a signal over the wreck, several other vessels ran on to the McKay. (Morgan, Fol. 30; Clement, Fol. 74; Harding, Fol. 86.)

No part of the McKay was visible in the Spring. She was entirely submerged. (Morgan, Fol. 28; Harding, Fol. 26.)

N. S. Bouton says he was City Superintendent in 1857, and that as such he made a contract that season with Packard & Co. to remove all wrecks from the navigable parts of the river, and the wreck of the McKay separately. He made an arrangement for the price with Packard & Co. They got her out, and "we" (the city) paid for it. He says he gave a certificate for the work when it was completed, on the harbor improvement fund.

Both Ingalls and Capt. Prindiville agree that the pulling they did upon the McKay in November, 1856, did not perceptibly loosen her or change her position, as far as they could see or judge; but all the testimony concurs that within four or five days afterwards, and in the ensuing Spring, she had become drifted further out into the stream near forty feet, with her stern slued round so as to lie nearly crossway of the channel, north and south, and in a position far more dangerous to navigation than at first, until the city finally removed her, as before mentioned.

It will be perceived from the foregoing summary, that in order to provide a proper officer to exercise the powers conferred upon the city, in such cases as the public interests should require the exercise of such powers, a harbor master was appointed, who was clothed with ample powers and means to institute and complete all needful proceedings for the

removal of all sunken vessels, where he should deem it for the interest of the city to enter upon and assume such an undertaking. It will be seen by a reference to the provisions of those ordinances, that in all cases where a sunken vessel was in the harbor, which in his judgment the public safety or interest required should be removed, he was fully authorized and empowered to enter upon and complete such removal, without any further order or direction by the city. In this case he did assume and enter upon the undertaking, and the city thus took charge and control of the wreck for the final removal, which they consummated in the Spring of 1857; but in doing so were guilty of that negligence *in the time and manner of the removal, and care of the wreck*, which caused the damage to the Libellants.

The facts of the case bring it within the rule of liability declared by the Supreme Court of Illinois in *Goodrich vs. The City of Chicago, 20th Ill.* 445. That was a case brought by these Libellants as plaintiffs against the city for this same loss. The Court rightly characterized it, when they said, "This action is brought *for neglecting to exercise the* "*authority* here (by city charter) conferred, to remove the "hulk of a sunken vessel near the mouth of the harbor." Holding that the defendant could not be made liable *for a mere omission* to act upon the powers given them, and that they had an option, under the charter, to say which, and how much, of the powers conferred they would assume and exercise, the Court sustained a demurrer to the declaration.

But the Court fully recognized the liability of the city under the different state of facts now alleged and proved. Their language is, "But *until* they (the city) had assumed the "responsibility of removing the wreck, we can not hold that "they were bound to remove it." This libel is filed upon the precise ground that the city *had* actually assumed the responsibility of removing the wreck, *and so* were bound to remove

it. The Court further said, "It does not follow that no pecu-"niary responsibility rests upon the city in connection with "the subject. If the city UNDERTAKES to do any of the acts "authorized by the law, it must do them in a careful and "proper manner; and if it does not, whoever suffers for the "want of such proper care, would be entitled to compensation "for the damages he thus sustains. If the city authorities *had* "*undertaken to remove this hulk*, and in so doing had care-"lessly left it in an exposed position, by reason whereof the "Plaintiffs' steamer had run against it, and was injured, they "might well have claimed damages for such negligence."

It is impossible for human testimony to come more fully up to all the conditions of liability here affirmed by the Supreme Court, than the proved case of these Libellants.

The city did not only *undertake* to remove this hulk, but *they did it*—they completed the undertaking. It was one of the "acts authorized by the law." They undertook the act in November, 1856. They laid their hand upon this wreck or hulk, and assumed what was in them from that instant, exclusive jurisdiction and charge and control over it. Their *duty* then attached within this decision of the Court, and they were responsible for the "careful and proper manner" of its completion. But what did they do? They found it with a portion above water, giving warning to all navigators of its baneful presence. There was ample time and opportunity for the city, *using reasonable diligence*, to complete the job before the close of navigation of 1856. The means were ample, and within their control and possession. Instead of this diligence, they suffered the wreck to remain where the winds would drift it further into and crossways of the stream. They suffered the season of navigation to close, and the wreck to remain all winter, subject to the action of the winds and currents, whereby in the opening Spring it was entirely submerged, covered with water and undiscernible, and had become

drifted some forty feet further into and near crossway of the channel. The winds and currents that did this were the agents of the Respondent, for by its want of diligence and by its negligence alone, in leaving the wreck thus exposed, did the winds and currents become effective to make it so much the more dangerous. The season of navigation opened about the first of March, 1857, nearly a month before the accident to the Huron. Yet the city still negligently left the wreck they had undertaken to remove, a treacherous snag under the waters, endangering the whole navigators of the harbor, and carelessly neglected to place any buoy or signal upon or over it to warn the Libellants of the hidden danger; and it was so left until some time after the accident to the Huron, when Packard & Co. completed the job, and got out the hulk for the Respondent.

Then after undertaking to do this act, they *did not* do it in "a careful and proper manner." The city authorities "*had* "undertaken to remove this hulk," and "in doing so" *did* "carelessly leave it in an exposed position," "*by reason* "*whereof* the Plaintiffs' steamer *did* run against it and was "injured;" and within every principle of the case in the 20th Illinois, the Libellants should be awarded their "damages" for such negligence.

The case could not be clearer, if the city by express ordinance had directed Ingalls, their harbor master, to remove the sunken wreck James McKay, by designation and description, and he had entered upon the work and attempted it, but instead of diligently availing himself of the time and the means then in his power to do it, had left it with the same consequences. And yet in that case few would contend that the city had not thus assumed the exercise of the power, and were not concluded by their election.

The general liability of all municipal corporations for non-performance of the duties devolved upon them by charter, to the injury of the public or of private individuals, may be regarded as fully established law.

Conceding that the case of *Goodrich vs. The City, supra,* furnishes the law of the case here, and that it was optional with the city, in the first instance, whether or not to accept the power and assume the duty, yet having so done in this case, *and undertaken to remove this wreck,* its liability then attached precisely as though it never had been optional, and its responsibility for all the consequences of want of diligence, or its negligence in the completion or performance, or want of care of the subject matter, to the injury of third persons, is well settled.

This whole class of cases received an elaborate and exhaustive discussion in this Court, both in the argument of counsel, and in the decision of the Court in *Weightman vs. The Corporation of Washington,* (1 Black R. 39,) the results of which are well stated in the head notes.

1. When a municipal corporation is required by its charter to keep a bridge in repair, if the duty was imposed in consideration of privileges granted, and if the means to perform it are within the control of the corporation, such corporation is liable to the public for an unreasonable neglect to comply with the requirement.

2. When all the foregoing conditions concur, a corporation is also liable for injuries to the person or property of individuals.

3. This liability extends to injuries arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance.

Among the numerous cases cited by Judge Clifford in *Weightman vs. Corporation of Washington*, *supra*, (to which we may refer in the argument) we call attention particularly to *Browning vs. The City of Springfield*, (17 Ill. 143,) as entirely unshaken by the subsequent case of *Goodrich vs. City of Chicago*, *supra*, and as still recognizing all the doctrine for which we contend as good law in Illinois. The same distinction is recognized in both, that although the city may have a discretion as to whether they will assume the work, yet that having assumed it, and as in this case commenced it, they are responsible for negligence in its completion. And the doctrine was incidentally recognized by the same Court in *The City of Chicago vs. Major*. (18 Ill., 349.)

On the point in question here, there can be no distinction in principle between a land highway and a river highway. None is made by the city charter here, which itself speaks of the river as a public highway.

In the *City of Pittsburg vs. Grier*, (22 Penn. 64,) it was very properly said:

"The cases show that the principle applies to public ports "in the possession of a city, as well as canals, bridges and "other highways in the hands of individuals and private corpo- "rations. There is no reason nor no authority for any distinc- "tion. The interests of commerce imperatively require that the "place, to which vessels are invited to come, should be in a "safe condition."

This last consideration we may be excused for pressing upon the attention of this Court. It is of the highest importance to the interests of a vast commerce, that the City of Chicago having, under the actual construction of the Supreme Court, an option and discretion as to the removal of obstruc-

tions from "the rivers that are public highways in the city," until they shall have assumed the responsibility of removing such obstructions, should not be permitted, when they have done so, to shirk the duty and leave that commerce exposed to destruction.

The highest considerations of public policy require, that it should be held as *an imperative duty* on the part of the city, when they have once elected to assume the exercise of the powers conferred upon them in this particular, to pursue it carefully and diligently to completion. It is then no longer left open to individual enterprise. It has become, within the very decision of the Supreme Court, and the whole current of authority, *a public duty* on the part of the city under their own election. And in the language of the Court, in *Lyme Regis vs. Henley*, "*no other person would be justified* "*in interfering, however necessary.*"

The harbor and the wreck itself is then within the exclusive control and jurisdiction of the city. Such wreck or obstruction, both in situation and in the necessary expenditure required for its removal, is practically beyond the power of individuals. It requires the care and power of public authority; while the numerous vessels, steamboats and water craft, daily arriving and departing from the port of Chicago, as the head of navigation, upon the great lakes and rivers of the West and North, call upon the Courts for such a rule of construction as shall protect them from shipwreck and disaster.

It was upon the principles here contended for, that His Honor, Judge Drummond, pronounced the decree in this case for the Libellants. He said:

"But the Libel in this case went further than the case "in the State Court. If the Libel and proof showed just

"such a case as was then decided, it might be conceded "that the Libellants would be estopped by the judgment of "that Court."

"But in the case in this Court, it was affirmatively alleged "and proved that the city did assume jurisdiction and "control over the wreck. It exercised the option which the "charter gave it. The city undertook to remove it in the "Fall of 1856, and did actually remove it in the year fol- "lowing."

"The city having undertaken to remove the wreck, could "not be permitted to defend on the ground that there was a "discretionary power given which had never been exercised."

"Having put its hand upon the wreck, the city was "bound to some degree of diligence in relation to it."

But the opinion of the learned Justice who reversed the decree, proceeded, we respectfully submit, upon a misapprehension of the Libel in this case.

The Libellants were beaten in the Supreme Court, upon the *express ground* that the declaration did not show that the city had assumed to exercise the power conferred upon them; that it was a naked power, which it was optional with them to accept or not, and that such option was not made by the simple passing of the ordinances averred in the declaration; at the same time substantially admitting and holding, that if the city had assumed the responsibility of removing the wreck, they were bound to remove it.

The Libel alleged that the city had assumed this responsibility in fact, and commenced the work in the Fall of 1856, by Ingalls, their harbor master; and with the steam-tug McQueen, had hitched to it, pulled upon it with inadequate

means, and then left it; and that by being thus left for the winter, it had become drifted further into the channel, where it was kept by the Respondent until March 29th, 1857, submerged, without buoy or signal to mark its position.

Now the learned Justice says, in his opinion:

"The ground work on which the claim for recovery is "made, (in the Libel) is, that the City of Chicago, by its "charter, had been vested with exclusive jurisdiction and "control over the river and harbor, and that a duty was "imposed by law upon it to remove obstructions from them; "and it is chargeable wherever an injury is suffered by "reason of its delinquency."

On the contrary of this, the ground work of the Libel is, that having this power given it by its charter, the city exercised its legal option to accept the power, assumed the responsibility and actually undertook to remove *this wreck*, and from henceforth in regard to *it*, the legal obligation to remove it with care and due diligence resulted from the Respondent's election, under the city charter.

Again the learned Justice says, in his opinion:

"In order to escape the effect of this decision, (in the "Supreme Court) the Libellants aver that the city undertook "to remove the wreck, and left it in a more dangerous "position than at first."

With deference we submit that there is no such averment in the Libel.

It is true, indeed, that connected with the allegation that the city hitched to and pulled upon the wreck, occurs the expression, "*but without raising or removing the same, the*

"*said Defendant did, as the Libellants* VERILY BELIEVE, "*loosen the said wreck or sunken vessel in its bed,* and then "left the same." It is equally true that both the harbor master and the captain of the McQueen say that they do not think they loosened the wreck in its bed, when they pulled at it. This allegation, if proved, might make the action of the city still more marked, but may all be stricken out from the Libel as it reads, and yet leave the *gravamen* of the Libel untouched, to wit: that the city actually commenced the work, and then negligently and carelessly left the wreck until the 29th of March, 1857, by means whereof it became, by the action of the winds and currents, drifted further into the channel under water, and so kept by the city without buoy or signal, so that the Libellants' vessel ran on to it. The *gist* of the Libel is, that the city undertook and assumed to remove the wreck, and did not use proper diligence or care in doing it; or in the language of Judge Drummond, "having put its hand upon the wreck, the city was bound "to some degree of diligence in relation to it."

But the learned Justice, in speaking of the attempt to remove the wreck, by the city, holds the following language:

"Conceding that the act of the harbor master was the "act of the city, YET THE ACT WAS GRATUITOUS, and if "productive of no mischief, I can not see how the act "itself could impose a legal obligation where none existed "before."

We submit that here lies the great error of this decision. That act was itself the election and acceptance by the city of the power conferred. It had no right over this wreck, except by virtue of that power. Such election was a finality. It could not be recalled. It was notice to all the world, the Board of Trade, and the Underwriters, and the com-

mercial men of Chicago, that they need not and must not interfere by private enterprise to protect their shipping, for the city had, in the very language of Judge Caton, "*assumed* "*the responsibility of removing the wreck,*" and henceforth all the dormant duties and obligations of the charter, depending on such election, became active and effective by the Respondent's own life-giving touch.

It could in no just sense be called *gratuitous*, because, from the moment of acceptance of the power, the city became charged, for the benefit of all third persons interested, with the proper execution of the chartered powers and duties thus accepted.

We submit, with all the deference due to the members of this high tribunal, that this decision will not bear the test of logical analysis, and that by every principle of sound reason and authority, the act of the city, by its harbor master, duly authorized thereto by the ordinances which we have alleged and proved for that purpose, was an election of acceptance of the power and duty by the city to remove this wreck, and that its liability followed as a logical sequence from the law and the facts of the case.

We shall advert to this view more fully hereafter, in treating of the effect of the judgment in the Supreme Court.

III.

There was no want of care and skill on the part of the master and crew of the Huron, in any way conducing to the accident.

The captain of the Huron, Sandford W. Morgan, was a sailor of twenty-seven years' experience. He had been employed for his responsible office by the Libellants, one of whom, at least, was an experienced sailor.

The boat was staunch and seaworthy; was properly rigged, manned and equipped, and had her signal lights brightly burning. She had already made one trip from this port that season, and after an absence of several days, had returned and entered the harbor without seeing any obstruction. No buoy or signal was up, or Morgan says he would have seen it, and could have avoided it while going out. The night was clear and fine. It was about 7 o'clock as they started with a cargo of passengers and freight. The master was on top of the pilot-house, and the mate was on the upper deck, aft. They had but 800 feet to go, to reach the lake, and the steamer slowly backed down between the piers, through a channel 200 feet wide, and with deep water in every part of it. As she neared the lake, her bow was turned more Southerly, to swing as she reached the end of the South Pier, and opposite the end of that pier she struck the sunken wreck on her aft starboard quarter, breaking her rudder chain, and making a clean hole 12 by 16 inches through the plank next to her keel, five feet under water. It was first discovered that her rudder chain was broken; five minutes served to

repair that, and while repairing it, word was sent up from the engine-room that the boat was sinking. Her bow was immediately turned up the river, and as the engine moved, the crank turned in the water, and she moved up the stream to the North Pier, 150 or 200 feet from where she struck, when she sank.

Capts. Clement, Stafford, Warren and Harding concur with Morgan and White, that it was good seamanship to back a boat of 165 feet length, from a river 200 feet wide, and that she can be handled as safely when going back as forward.

A steamer of that size and weight, laden with a cargo of freight and passengers, lying with broken rudder chain across the mouth of the Chicago river, with a hole in her bottom 12 by 16 inches in size, and more than five feet under water, admitting a torrent that all the pumps that could be placed on her would not materially diminish, could not, of course, be prevented from sinking; in the language of a witness, "by any power other than that of our Maker." All of the Libellants' witnesses agree that pumps could do no good in such a case, and the Respondent's witness (Durfee) intimates that four steam pumps could not have diminished the water in her materially, while the hole was unstopped.

But it may be said we should have known the wreck was there, and have avoided it. The facts show otherwise.

Capt. Morgan says he neither knew nor had heard of the sunken wreck. He sounded all around the wreck the day after the accident, and found it entirely submerged. (Fols. 27 and 28.)

White, the mate, says no part of her was visible; that he had been in and out of the harbor with the Huron that Spring, and supposed the wreck had been removed. (Fol. 57.)

Ingalls, the harbor master, says no portion of the wreck was visible. (Fol. 49.)

Fuller, the next harbor master, says no portion of her was visible, and he never knew it was there till after the accident to the Huron. (Fol. 53 to 54.)

Hugunin, the deputy harbor master, says her stern post was a foot under water, and ten feet over her stern, and her stem laid out. (Fol. 68.)

Warren says that in ordinary weather no part of her was visible, but when the wind was Southward, and the water was low, she was visible; but in the ordinary state of the water, she was not visible. (Fol. 82.)

Harding, who was in the wrecking business, and made it his business to know all about every wreck in the harbor, and especially this wreck, says that he went and examined it and found no part of it visible; that after the accident, lake captains used to come to him to enquire where it lay. (Fol 86.)

Kelly, a witness for Defendant, says the end next the North Pier was 5 to 10 feet from the pier, and was a foot or two above water. (Fols. 129, 134.)

The statements of Kelly and Hugunin are reconciled by the testimony of Capt. Warren, that when the water was low, the end next the pier was a little above water; but no witness says the end out 50 to 80 feet from the pier, was visible.

But it can not be doubted, that when the Huron came in on the 27th of March, no portion of her was visible, nor ever after that, for Morgan, Harding and Judge Fuller, the city harbor master, all swear they went to the wreck and took soundings all around her, and that no portion of her was visible.

IV.

Another objection to the Libellants' case is found in the third Article of the Respondent's answer, which sets forth that the Libellants are barred from maintaining the Libel, by reason of a judgment rendered by the Supreme Court of Illinois, at the April Term, 1858, against the Libellants and in favor of the Respondent, upon a Demurrer to a Declaration filed in the Circuit Court of Cook County, at its October Term, 1857, which Declaration is averred to have been for the same causes of action which are set forth in the Libel.

We have, in the previous portion of this argument, incidentally considered the question presented under this point, but as this was the point mainly relied on, and the only one upon which the decision of the District Court was reversed by the Circuit Court, we deem it proper to give it a further consideration.

This objection, as we understand it, would have essentially the same force in this Court, if the same decision had been made in another suit between different parties. It is based upon the position "that the Supreme Court of the United "States has always held, that the Federal Judiciary will adopt "the construction which the highest court in the State places "on its own statutes."

His Honor, Judge Davis, who gave the opinion on Appeal, cites the opinion of the Supreme Court in *Goodrich and Drew vs. The City*, (20 Ill., p. 445,) and holds that such decision "is an authoritative adjudication, denying that there is an

"obligation imposed by law on the city of Chicago to remove "obstructions from its river and harbor," and that such case is decisive of the present action.

The learned Judge, coming to the conclusion that this decision is conclusive upon the right of the Libellants to recover, reverses the decree of the District Court, although at the same time expressing the opinion "that the facts of the case "are free from difficulty, and would sustain the claim made "by the Libellants, if the Court was relieved from the embar- "rassment" of the decision referred to; and he further states "that if this question was an open one in this State, I should "have no hesitation in holding that a legal obligation is imposed "on the city to remove obstructions from the river, and that it "is bound to make full redress to every person who is injured "by reason of its failure to perform its duty. I think that "the true interests of commerce, and the best interests of "the city would be promoted by such a construction, and "that it is sanctioned by principle and authority."

As the decision of the Supreme Court referred to by the Circuit Judge as conclusive of the rights of the Libellants, is adjudged by him to be opposed "to the best interests of "commerce and the city," as well as unsound in law, we shall be performing a work which will commend itself to the judgment of the Court, in seeking to establish that such decision is fairly susceptible of a construction which relieves it in part at least of its injurious consequences to the public, and takes the present case entirely out of the rule established by it.

And in the outset, we think that while admitting the position that this Court "will adopt the construction which "the highest Court of a State places on its statutes," we

have a right to insist, that where the construction, so given, seems to the Court opposed both to authority and to the public interests, that such construction shall be strictly confined to the precise point decided, and shall not be enlarged or extended beyond what is necessary to give full effect to such decision; and where the rule so laid down can be fairly limited to a certain class of cases therein referred to, it shall not be held to embrace other classes of cases, not necessarily within the terms of such decision.

Applying this rule of construction to the decision in the 20th Ill., and we are freed from all difficulty in respect to the effect of that decision upon the case now before the Court.

It is manifest from a careful examination of that case, in connection with the previous decisions of the Supreme Court of Illinois, that the intention of the Court, by that decision, was to restrict the liability of the city, in respect to the harbor, to cases of obstructions therein, *over which the city should take actual jurisdiction, by entering upon and assuming the work so authorized*, and to relieve the city from any legal liability for mere *omission to take any action* for the removal of such obstructions.

In other words, the meaning and intent of that decision was to give to the city the *option to determine* what obstructions in the harbor they would assume and undertake to remove, and as to these, leave their obligations, duties and liabilities the same as if this decision had not been made—the same as the law has established them to be in similar cases of municipal action; but as to all cases over which they did not assume to act or take actual jurisdiction, freeing them from any liability to any party in consequence of such omission to act.

In the case of Browning vs. The City of Springfield, 17 Ill.) p. 145, the Supreme Court had established the liability of a municipal corporation for *mere negligence* in not repairing the streets of the city. In that case, the distinction between misfeasance and malfeasance is fully discussed, and the conclusion fully and broadly stated, "that where a specific, full and com- "plete duty is imposed, with powers adequate to discharge it, "and means that appear ample to its accomplishment, the "obligation is perfect, and liability for neglect is unquestiona- "ble for all damages resulting from such neglect."

The application of this doctrine in its full extent, to the Chicago harbor, involved a much more extended liability than in the case of the streets of a city to which it was applied in the decision above cited, for the reason that this harbor (according to the limits prescribed for it by the charter) extended for a mile outward into the lake, and inward to the sources of Chicago river and its branches, which extended some twenty miles into the interior of the county.

To construe the duty imposed by the charter with reference to the harbor, in such manner as to leave the city liable for not undertaking to remove every obstruction to the navigation which might be found throughout this large area, and in places, too, where the navigation might be so unfrequent, and of so little importance as not to justify the expense of such removal, or where, as in cases of wrecks beached upon the shore of the lake at points where the waters were not navigable, and the public interests or safety did not demand such removal, the Supreme Court thought might involve a liability of immense extent upon the city, without any corresponding benefit to the public.

It was in view of these considerations, that the Supreme Court, in the case in the 20th Ill. were induced to narrow

the liability of the city under the charter in respect to the harbor, by giving to the city the right to consent or refuse to assume or undertake the power and authority conferred by the charter, for the removal of wrecks and obstructions in the harbor, and to restrict the liability of the city to the cases in which it should assume to exercise the authority conferred, by actually entering upon and undertaking the work, and to no others; but as to the cases in which it did thus elect to exercise the power conferred, by entering upon and undertaking the work of removal, it is left by that case under the same obligations, duties and liabilities, as if its liability for *not undertaking such work* had not been so restricted.

The language of the Court in the case in the 20th Ill. fully sustains these views.

The Court say, "that by the charter, authority is conferred "upon the city to remove obstructions from and to widen, "deepen, &c., the harbor of Chicago," and that harbor is declared "to embrace the Chicago river and its branches to "their sources, and to extend one mile into the lake."

"That this action is brought for *neglecting* to exercise the "authority here conferred, and that to maintain the action, "they must hold THAT THE CITY IS BOUND TO EXERCISE *all* "*the authority here conferred, and to do all the acts here* "*authorized.*"

Such, the Court say, "was not the intention of the Legisla- "ture;" for if so, "they must do all that is here authorized, "or be answerable for all the damages which may be suffered "by the omission."

"*The law has either left it to the discretion of the Com-* "*mon Council to say which of these acts the public good* "*requires them to perform, or it is imperative that they shall* "*perform all.*"

"The very extent of the powers conferred, and the magni-
"tude and expense of the work which they are authorized to
"perform, show that it was never the intention of the Legisla-
"ture to *impose the absolute obligation* upon the city to per-
"form it all, and if not all, *then no part was imperative*, for
"no authority is vested anywhere except in the Common
"Council, to say *what part is necessary, expedient and proper*
"*that they shall perform.*"

So far, the whole of the decision proceeds entirely upon the ground, that there can be no legal claim against the city for *not undertaking to act* under the power so conferred; that it is wholly within their own discretion whether they will act, or refuse to act under such power, and of the propriety of this they must be the judges.

But the Court at once proceed to repel any conclusion which might be drawn from their language before used, which would prevent the legal liabilities incident to such cases from attaching in all cases where the city should undertake to act under the power so conferred, by adding:

"It does not follow that no pecuniary responsibility rests
"upon the city in connection with the subject."

"If the city *undertakes to do any* of the acts authorized by
"the law, it must do them in a careful and proper manner;
"and if it does not, whoever suffers for the want of such
"proper care, would be entitled to compensation for the
"damages he thus sustains. *But until the city had assumed*
"*the responsibility of removing the wreck, we can not hold*
"*they were bound to remove it.*"

The language of the concluding paragraph, above cited, is very expressive, and fully confirms the position for which we

contend. "*Until the city had assumed the responsibility* of "removing the wreck, *they were not bound to remove it.*" In other words, they were not legally bound to assume the responsibility of removing it. It was for them to decide whether the public interests required they should assume such responsibility; but when they did assume the responsibility of removing the wreck, then, by the very terms of the decision itself, they would *become bound to remove it.* They were not bound to act, except in such cases as they deemed the public interests required; but having assumed to act, they were bound to complete and consummate such action; and from the moment they undertook the work, they were responsible for its completion and for negligence in relation to it, in the same manner and to the same extent, precisely, as if the work so assumed to be done by them was one, as to the performance of which they had no option in the first instance, but had been bound by the charter to undertake.

That this view of the meaning and effect of the decision of the Supreme Court is correct, is made still more clear by applying its language to the case made by the Declaration, upon which they were adjudicating.

The Declaration in that case is set forth in full, in folios 109 to 119 of the Error Book. It will be seen, by a reference to its different counts, that the ground of liability, set forth in every count in the Declaration, is purely and simply "*the "omission of the city to take action for the removal of the "wreck.*"

The Declaration sets forth the clause of the charter imposing the duty, the ordinances of the city establishing the proper officers to execute the duty, and the needful provisions to furnish the necessary means for its performance, and the general

jurisdiction of the city over the harbor; and having by this recital established, as the pleader supposed, a legal duty on the part of the city to take action for the removal of such wreck, and a legal liability for the neglect or failure to take such action, proceeds in every count to allege the breach of such duty on which such claim for damages is based. In the first count it is alleged in the words following:

"That the said Defendants, not regarding their duty in the "premises, heretofore, to wit, on the 29th day of March, 1857, "and for a long time prior thereto, to wit, for the space of "five months, wrongfully, negligently and carelessly *suffered* "*and permitted an obstruction to be and to remain in said* "*waters*, and did not, nor would they, during all said time, "remove the said wreck, &c."

The second count alleges the breach in the same words, adding, "as by the said ordinance in such case made and "provided, the said Defendant was bound to do, and that "by means of such negligence, in *not removing* said sunken "vessel, &c., the accident occurred."

The third count, after averring that the Chicago river is under the *exclusive control* and jurisdiction of the said city, and that it was then and there its duty to keep the same free from obstruction, alleges the breach of such duty in the same language as in the first count.

It will be seen, therefore, that the case made by that Declaration proceeds upon an absolute obligation on the part of the city to remove all obstructions growing out of the power conferred, and the ordinances establishing the proper officers and providing the needful means for the exercise of that power, and that the ground of action proceeds only and

wholly upon the omission of the city to exercise the power in the given case. There is no averment in the Declaration that the city ever undertook or assumed to remove the wreck, or entered upon the work of such removal; but on the contrary, the Declaration, *ex vi termini*, excludes the idea of such assumption of responsibility or undertaking on the part of the city, by its express and positive allegations that the city neglected and refused to take any such action, but permitted the wreck to remain, and would not undertake its removal.

And the Supreme Court being called upon to decide on General Demurrer, as to whether such a Declaration sets forth a legal ground of action against the city, decide that it does not, because the city were not bound to undertake the removal of any obstruction in the harbor, except they elected so to do; that it was a matter of legal option with them whether they would or would not in any given case exercise the power so conferred; that the passage of ordinances and the providing of the proper officers and means to perform the work in such cases as they should elect to undertake it, did not impose any legal obligation to undertake any particular work, and therefore, notwithstanding all the allegations of the Declaration respecting the charter, and the ordinances, and the appointment of harbor master, were admitted, yet it did not follow that the city were bound to undertake the removal of this or any other obstruction; and so no sufficient cause of action was set forth in the Declaration.

Now, giving to this decision its whole legal effect, it does not touch the case made by this Libel. It simply decides that a case will not lie against the city for *mere omission to act—for the mere non-assumption of the power conferred*

over the harbor by the charter, by neglecting to undertake to remove a particular obstruction.

Viewing it as a decision upon this point, its wisdom may well be questioned, and we may fully concur in the opinion of His Honor, Judge Davis, that a contrary opinion would be more consistent with principle and authority. But, because such decision has unwisely and erroneously (as the Circuit Court intimates) decided that the city has an option, under the charter, whether it will, in any given case, undertake the work which it is authorized to undertake, (instead of holding, as the public interests and the soundest reason and best authority would seem to require, that it is responsible for not entering upon and performing such work *in all cases* of obstruction to the harbor,) we are not therefore compelled to go outside of the case, and beyond its utmost limits, and conclude, what that decision does not conclude, that in cases where the city *does* make its election, and *does* enter upon and undertake the work which it is authorized to do, that it is not responsible in all such cases, both for completion of the work so assumed, and for any negligence in the course of its performance, by which any person suffers injury.

The question of liability, in all cases where the city had elected to act under the power, and entered upon and assumed the work, would therefore remain an open question, uncontrolled and unembarrassed by that decision, and this Court would be left at perfect liberty to decide such a case in conformity with their own views of the law and the facts.

It should be quite sufficient, in a case where the merits of the case are confessedly with the Plaintiff, and where sound reason and authority sustain his action, to show that

the case made by the Libel is not within the express point decided by the Supreme Court in the case in 20th Ill.; but we may go even further, and maintain with great confidence that the case made by this Libel is sustained by the very language of the Court itself, in giving that decision. For this Libel does not, like the Declaration in the case referred to, allege, as a ground of liability, the mere failure of the city to exercise the power conferred upon it; but it goes further, and avers the negligent failure to go on and complete the removal of a wreck, after it had assumed and undertaken to remove it. It alleges an express assumption of the responsibility of removing such wreck, an entering upon and commencing the work of removal, a negligent suspension of that work for a long period of time after such commencement of its undertaking, and a negligent course of conduct with respect to the wreck between the times of the commencement of said work, and the occurrence of the injury to the Libellants.

The following allegations, which are contained in this Libel, and every one of which is proven or admitted in the case, present a series of facts not found in the Declaration in the case referred to, and which not only present a totally different case from that which was adjudicated upon, but constitute such a case as the Court itself there intimated would impose a liability upon the city:

"That the city assumed the exclusive right to remove the "same, and did, by their said harbor master, Ingalls, under- "take and commence the removal of the said sunken wreck, "by hitching thereto a steam tug, and thereby attempting "to raise and remove the same; but they did not complete "the work, nor raise and remove said sunken wreck, as they "had exclusively assumed and undertaken to do, but worked "on the said sunken vessel, endeavoring to raise the same,

"and pulled several pieces of timber from said vessel in the "attempt to raise and remove her, but without raising or "removing the same, carelessly left said vessel until the 29th "day of March, 1857, by means whereof, during that time, by "the action of the winds and currents, said wreck became "drifted further into the channel of the river the space of "forty feet, and during all the time aforesaid was kept in "the channel of the river by the Defendant, under water, so "that the same could not be seen, and without placing or "fixing any buoy or signal to mark the place of said sunken "wreck."

These allegations present a new case, which has never been passed upon by the Supreme Court, and which, so far as we have any reason to know their views, would have established a ground of action against the city.

It is quite sufficient for our purpose, however, that the case so made by the Libel has never received the adjudication of the Supreme Court, but remains open for the judicial determination of this Court; for, in the absence of any such controlling decision, depriving this Court of the power to do the Plaintiff justice, we have the concurrent judgment of both the District and Circuit Courts, that the Libellants' case is sustained upon the facts.

It is said that the act of entering upon the work "could "impose no legal obligation, when none existed before." It was for the very reason that the city had an option whether to act or not, under the power conferred, that no legal obligation arose, until it elected to act; but the legal obligation and liability arose from and attached to such election itself, and from the time the city assumed to enter upon and perform the work, it was under the same legal obligation respecting such work, as if the city had never had any choice whether

it would enter upon it, but had been bound to undertake such work *ab initio.*

It is said that "the act of attempting to remove the wreck "was not wrongful," and therefore it could occasion no liability.

We are far from claiming that it was wrongful; on the contrary, we contend that while the legal right of refusing to act was under such construction of the city charter as the Supreme Court have made, vested in the harbor master, it would have been a gross perversion of such right, and criminal neglect of the public safety and interests on his part not to have acted in such a case. The option to act, or not to act, was allowed, to save the city from being compelled to act in cases where large expense would be involved without corresponding benefit to the public. But in the case of sunken wrecks lying in the very channels through which the whole commerce of this great city was to pass, it would have been strange, indeed, if the city officers, appointed for the very purpose, should refuse to act. It would have been a neglect of the lives and property of the citizens, which would have amounted to a moral, if not a legal offence, for which such officer ought to have been removed from his office. It was not only not wrongful, but eminently right and proper, that the city, through its proper officer, did undertake the work of removing this wreck; but having so undertaken it, they are not at liberty now to set up in defence that they were not bound to undertake it, that it was a gratuity, a work of supererogation. They have, by undertaking it, assumed the same responsibility and the same liability, as if such undertaking, instead of being in the first instance voluntary, had been compulsory.

It is said that "although it was proper enough in the "city to try to remove the wreck, but if it was not an

"imperative duty by law to do it, then when the city "attempted to do it, and failed, and abandoned the attempt, "leaving the wreck as it was before," then no liability can be created.

But this proposition begs the very question under discussion, viz: that the very entry upon, and undertaking of the work did, *ipso facto*, impose the legal liability *to complete* the undertaking, and to execute the work in a careful and skillful manner; that the exemption of the city, under the case referred to, is only an exemption from assuming or undertaking to act under the authority conferred, but that when they do so undertake to act with reference to any subject matter, the duty conditional upon such election at once arises, and the city forthwith becomes subject to all the obligations and liabilities arising out of such duty.

Such duty of removal becomes obligatory and imperative, not from the mere force alone of the provisions of the charter conferring the power, and the means, but from these, *and* the superadded action of the city in electing to exercise and act under such powers, by entering upon and undertaking the work.

We submit, therefore, that the judgment upon the Demurrer to the Declaration, in the case referred to, can have no effect to bar the right of recovery on the case made by this Libel.

While a judgment on Demurrer is admitted to be as valid as any other judgment, it is equally undeniable that it is a bar only to the precise case made by the pleadings, and is no bar to a new suit setting up another and different case.

The principles applicable to such judgments are fully set forth in the opinion of the Supreme Court in *Gilman vs. Rives* (10 Peters, 301.)

In *Smalley vs. Eddy* (19 Ill., 211,) the Court hold that "if it does not appear that the count alleged facts amount-"ing to a cause of action, upon which judgment might have "been lawfully rendered on proof of these allegations, the "judgment thereon for the defendant is no bar to another "action upon the same instrument."

"A judgment rendered for defect of pleading is not a "judgment upon the merits, and therefore is no bar to "*another* action upon the same contract."

"If the facts alleged in the count as the Plaintiff's cause "of action, being admitted or proved, would not entitle the "Plaintiff to judgment, the judgment thereon for the Defend-"ant would not bar or estop the Plaintiff from again suing "upon the same contract declared on in that count."

1 Chitty Plead. 198.

Again, as a mere technical bar, the force of a judgment at law, when pleaded in Admiralty, may be doubted on authority.

"It has been held that an action at common law for "damages caused by a collision, will not affect the jurisdic-"tion of the Admiralty, and that the verdict of the jury, "upon the facts of the case, will not be conclusive upon the "judgment of the Admiralty Court."

Parsons on Maritime Law, Vol. 1, 210, citing "The Ann "and Mary," 2 Wm. Robinson, 190.

Whether this ruling shall be approved here, we do not consider so important in this case, as we claim, broadly, that we make in the Admiralty an entirely new and different case from that made at law.

We submit copies of the opinion of his Honor, Judge Drummond, and also of his Honor, Judge Davis, herein referred to, for the consideration of the Court. The case is one of large importance to the Libellants, and to the public interests, in the principles involved, and we indulge the belief that this Court will not find the case in the Supreme Court of Illinois, in any respect an impediment to the admitted justice of the Libellants' claim, or to some degree of protection to the large and increasing shipping interest of the lakes.

GOODWIN, LARNED & GOODWIN,

Of Counsel for Libellants.

District Court of the United States,

Northern District of Illinois.

In Admiralty.

ALBERT E. GOODRICH AND
GEORGE C. DREW,
Vs.
THE CITY OF CHICAGO.

OPINION OF JUDGE DRUMMOND.

THE facts in the case were briefly as follows:

In November, 1856, the schooner McKay was sunk near the North Pier, and just outside the South Pier of the Chicago harbor. In a few days after the McKay was wrecked, (the latter part of November or beginning of December, 1856,) the harbor master of the city employed the tug McQueen to remove the McKay, and failed in the effort. As the winter was coming on and navigation about closed, nothing further was done at the time. For some time after the McKay sunk, some portion of her was out of the water, so that it could be seen where she lay, but on the opening of navigation in the Spring of 1857 she had become entirely

submerged. A change of position took place in the wreck, but the Court was of the opinion that the evidence established that it was in consequence of the action of the water and from natural causes, and not through the efforts of the McQueen. Though the McKay might have been thrown more across the channel by the storms of the Winter, which circumstance might have contributed to the loss of the Libellants, yet nothing done by the harbor master or the McQueen had tended to produce it, and therefore the city could not be liable on the ground of an improper performance of an act which the city was obliged or had the option to perform. On the evening of the 29th of March, 1857, the steamer Huron, of which the Libellants were the owners, in backing out of the harbor, ran into the wreck of the McKay, knocked a hole in the bottom of the steamer, and within a few minutes filled and sunk.

The owners of the Huron brought action in the State Court against the city, on the ground that the city was *obliged* to remove the wreck. The Declaration filed in the case proceeded upon the presumption that the charter *compelled* the city to remove such obstructions as that of the McKay from the river, and that the omission to do it made the city liable for all the loss sustained by the owners of the Huron. It was not alleged that the city had ever attempted to exercise any control over the wreck, or interfere with it in any way. A Demurrer was interposed to the Declaration, by the city, for the reason that the charter did not oblige the city to remove obstructions, but only gave it discretionary power to do it.

Of this opinion was the Court below, holding the city not liable; and of the same opinion was the Supreme Court of the State, the latter Court ruling that as the city had not attempted to exercise the power conferred in this instance,

viz: the removal of the wreck—it could not be held responsible for the loss. The case is reported in 20th Ill. Reps., p. 445.

But the Libel in this case went further than the case in the State Court. If the Libel and proof showed just such a case as was then decided, it might be conceded that the Libellants would be estopped by the judgment of the State Court.

But in the case in this Court it was affirmatively alleged and proved that the city did assume jurisdiction and control over the wreck. It exercised the option which the charter gave it. The city undertook to remove it in the Fall of 1856, and did actually remove it in the year following. It appeared by the testimony of the captain of the McQueen, that the reason why the effort made in the Fall of 1856 was not successful, was because the hawser furnished was not strong enough, not being able to bear but a small portion of the power which the tug could use.

The city having undertaken to remove the wreck, could not be permitted to defend on the ground that there was a discretionary power given which had never been exercised. Under the charter and the acts of the harbor master, and the power given by the ordinances, the Court must assume that the act of the harbor master in this case was the act of the city, even though no express authority was given in the particular case. If the city had shown that it was impossible, with the ordinary means at its disposal, to remove the obstruction, then it might stand excused; but the proof showed that it might readily have been accomplished. Again, admitting that the near approach of Winter might justify the discontinuance of any further effort, still, having put its hand upon the wreck, the city was bound to some degree of diligence in relation to it. If it was difficult or impracticable to remove

it in the early Spring, something should have been placed over it, as a buoy by day—a light by night—or some signal to notify mariners that there was a hidden danger there. Nothing of this kind was done.

This, of course, would not relieve the Libellants from the consequences of a want of skill or prudence on the part of those navigating the Huron. It did not appear that they knew of the sunken vessel being there, and it could not be said to show any want of skill or prudence to back out the Huron in the manner in which it was done on the night referred to.

The Court, therefore, would pronounce for the Libellants, for the reason that the city took charge and control of the wreck; that it exercised the option which the charter conferred, and that it should at least have marked the spot where the obstruction existed, so as to give warning to navigators of the peril that lay in their path.

The question of jurisdiction, about which at one time great doubt was entertained, was considered by the Counsel and by the Court, as settled in favor of the jurisdiction in Admiralty, by the case of the Philadelphia, W. & B. R. R. Co. vs. The Philadelphia & Hav. De Grace S. T. Co.—23 Howard, S. C. R. 209.

Circuit Court of the United States,

Northern District of Illinois.

In Admiralty.

ALBERT E. GOODRICH AND
GEORGE C. DREW,
Vs.
THE CITY OF CHICAGO.

OPINION OF JUDGE DAVIS.

THE Libel in this case is filed to recover damages by reason of an alleged obstruction of the Chicago river.

The Libel alleges that Goodrich and Drew were the owners of the steamboat Huron, which was regularly navigating the lakes, and that, while leaving the port of Chicago, on the 27th day of March, 1857, she ran against a sunken wreck in the river, at the mouth of the harbor, and was seriously injured; for which damages are claimed from the Defendant. The ground work, on which the claim for recovery is made, is, that the City of Chicago, by its charter, had been vested with exclusive jurisdiction and control over the river and harbor, and that a duty was imposed by law upon it to remove obstructions from them; and it is chargeable wherever an injury is suffered by reason of its delinquency.

The charter of the city provides that the Common Council shall have power, by ordinance, "to remove and prevent all "obstructions in the waters which are public highways in said "city, and to widen and straighten and deepen the same "* * * to preserve the harbor * * * * "to prevent and remove all obstructions therein, and to punish "the authors thereof, * * * and by such ordi- "nance charge such penalties, together with such expenses as "may be incurred in inforcing these provisions."

The question of legal obligation depends upon a proper construction to be given to these clauses of the statute incorporating the city. The Defendant contends that the language of the Act is that of permission and not of command, while the Libellants insist that it must be construed as creating an imperative duty. If this question was an open one in this State, I should have no hesitation in holding that a legal obligation is imposed on the city to remove obstructions from the river, and that it is bound to make full redress to every person who is injured by reason of its failure to perform its duty. I think that the true interests of commerce and the best interests of the city would be promoted by such a construction, and that it is sanctioned by principle and authority. The Supreme Court of the United States has always held that the Federal Judiciary will adopt the construction which the highest court in the State places on one of its own statutes. "This course is founded on "the principle, supposed to be universally recognized, that "the Judicial Department of every Government, where such "department exists, is the appropriate organ for construing "the legislative acts of that Government." (10 Wheaton, 159.) If, then, this question is settled in Illinois, I must suppose it to be rightly settled.

Goodrich and Drew sued the city of Chicago, at law, in the Circuit Court of Cook County, for the very matter for

which they now sue in Admiralty. The Declaration set forth the cause of action fully. It asserted that legal obligation resting on the city to remove obstructions from the harbor, and, until removed, to place buoys and signals to indicate danger; and its liability, because the city had wrongfully and negligently permitted a sunken wreck to remain near the mouth of the harbor to the danger of navigation, and through which negligence the injury happened. All the provisions of the charter, which could be supposed to confer authority on the city, were recited, and it was averred that the city had assumed to discharge the duty and obligation imposed upon it by law, and for that purpose had levied and collected taxes, and controlled and managed the navigable waters of the city, and had passed ordinances and regulations upon the subject. In one of the counts of the Declaration the ordinances, which were passed by the Common Council, to carry into effect the power given to the city, were particularly set forth. In short, every averment was made that was necessary to raise the question, whether there was an obligation imposed by law on the city to remove obstructions from the Chicago river. A demurrer was interposed to this Declaration in the Circuit Court, and sustained *pro forma*, and the case was taken to the Supreme Court for adjudication. The case is reported in 20 Ill., 445. The judgment of the Court below was affirmed. The Supreme Court say, that, "To maintain this "action, we must hold that the city is bound to exercise "all the authority conferred, (by the charter) and to do all "the acts which it authorizes. Such, we are satisfied, was "not the intention of the Legislature. The very extent of "the powers conferred, and the magnitude and expense of "the work which they are authorized to perform in reference "to the harbor, show that it was never the intention of the "Legislature to impose the absolute obligation upon the city "to perform it all, then no part was imperative; for no "authority is vested anywhere, except in the Common Council

"of the city, to say what part is necessary, expedient and "proper that they shall perform." This is an authoritative adjudication, denying that there is an obligation imposed by law on the City of Chicago to remove obstructions from its river and harbor.

In order to escape the effect of this decision, the Libellants aver that the city undertook to remove the wreck and left it in a more dangerous position than at first. This allegation was doubtless made because the Supreme Court has said that, if the city authorities undertook to remove this hulk, and, in so doing, had left it in an exposed position, by reason whereof the steamer Huron ran against it and was injured, then the city would be liable. There can be no clearer principle of law than this. A municipal corporation, like a natural person, when it undertakes to do an act, must do it carefully; and, if any one is injured in person or property, because it has done the act negligently and carelessly, an action will lie. I think the proof in the case fails to establish the fact that what was done by the city tended even to produce the injury complained of. The harbor master did make an effort in November or December, 1856, to tow this wreck out, and employed a tug to do it; but, after making an unsuccessful effort, abandoned the enterprise. He swears that the wreck was imbedded in the sand, and that they did not succeed in loosening her in her bed at all, or even in changing her position. The master of the tug corroborates the testimony of the harbor master. He swears that the efforts they made did not change her position at all, and that they left her in no more dangerous condition than they found her; that, if they had not touched her, the subsequent gale would have shifted her position, and that what they did could not have contributed in any degree to her subsequent change of position.

But it is said that the city assumed the responsibility of removing the wreck, and that the Supreme Court recognized the liability of the city whenever this was done. In what way did the city assume this responsibility? If by passing an ordinance requiring the harbor master to give notice to the owners of vessels to remove the wreck, and which was done in this case, then it can be replied that the Supreme Court decided that this ordinance imposed no legal obligation on the city, for the existence of the ordinance was averred in the Declaration. But it is said that the city assumed the responsibility of removing the wreck, when the harbor master made the attempt to do so and failed. Conceding that the act of the harbor master was the act of the city, yet the act was gratuitous, and, if productive of no mischief, I cannot see how the act itself could impose a legal obligation when none existed before. The attempt made to remove the wreck was unsuccessful, and abandoned. It injured no one, and contributed in no way to the injury which the Libellants suffered. The act was not wrongful, and was not the cause of the accident. It was proper enough in the city to try to remove the wreck, but if it was not an imperative duty by law to do it, then, when the city attempted to do it and failed, and abandoned the attempt, leaving the wreck as it was before, on no known legal principle can a liability be created. After all, if no absolute duty has been imposed on the city, by its charter, to remove obstructions, then it has done nothing in this case to incur responsibility. If the decision of the Supreme Court of Illinois is binding on this Court, in my opinion it is an end of this litigation.

I have not discussed the question of *res adjudicata*, although it was elaborately argued. Goodrich and Drew cannot again litigate in Admiralty the same matters that were decided at common law. The judgment, although on demurrer, is a judgment on the merits. It decides that the action

will not lie, and not that the cause of action was not well stated. The merits of a controversy can be as well and conclusively settled by an issue of law as on an issue of fact. Goodrich and Drew are concluded by that litigation, and unless they can show that they are entitled to recover, outside of the facts stated by them in their action at law, then they are remediless.

It is proper to say that the facts of this case are free from difficulty, and would sustain the claim made by the Libellants, if the Court was relieved from the embarrassment attending the institution and determination of the suit at law in the Supreme Court of the State.

The Libel is dismissed.

SUPREME COURT

—OF—

UNITED STATES.

No. 116

ALBERT E. GOODRICH, ET AL.,
VS.
THE CITY OF CHICAGO.
} Appellants.

BRIEF OF APPELLEE.

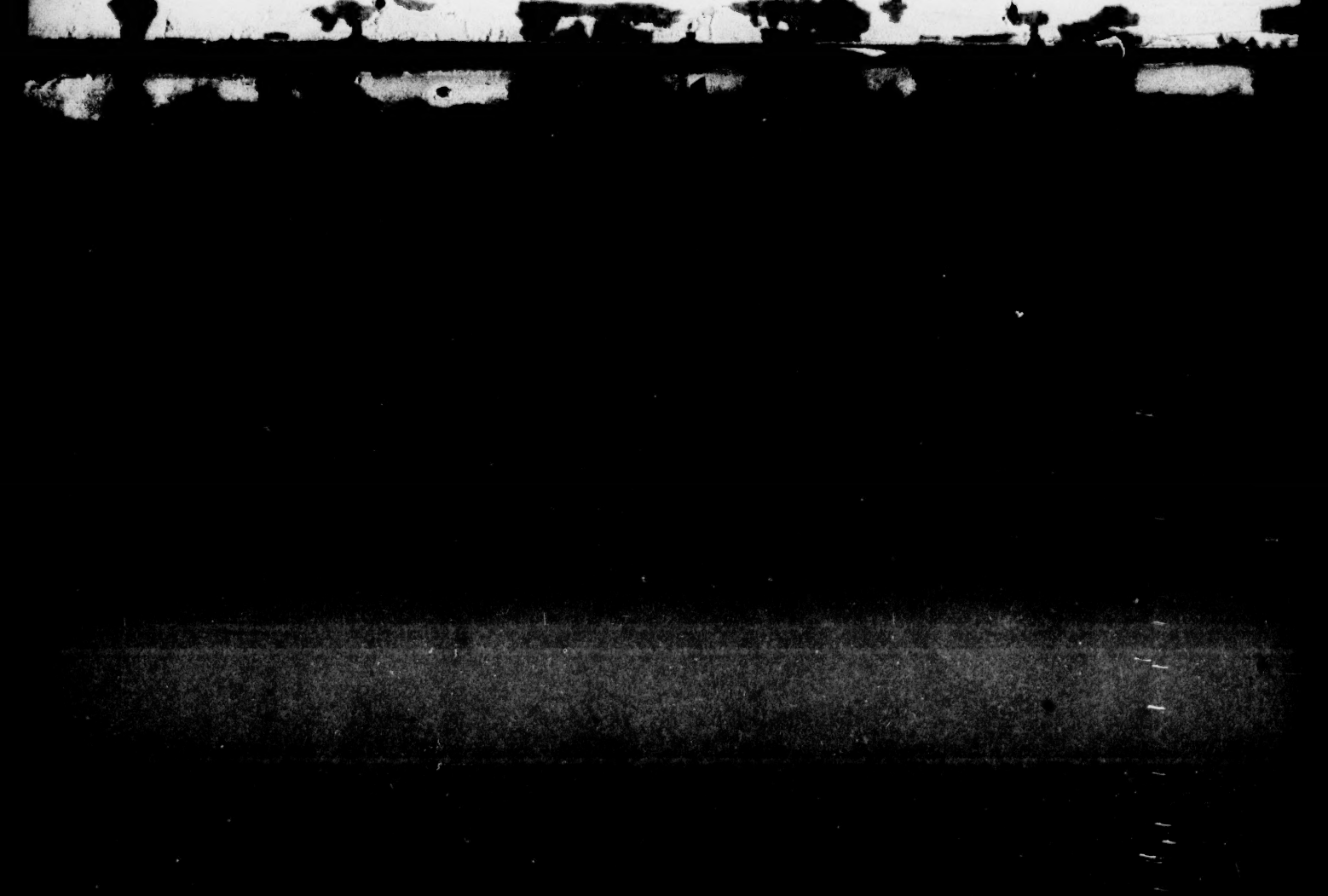
S. A. IRVIN,

COUNSEL TO CORPORATION.

CHICAGO:

F. A. PIERCE & CO., BOOK & JOB PRINTERS,
20 La Salle Street.

1866.



SUPREME COURT OF THE U. S.

ALBERT E. GOODRICH & GEORGE C. DREW, APPELLANTS. *In Admiralty.*

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLEE.

The appellants filed their libel in the District Court of the United States, for the Northern District of Illinois, on the 19th of Oct. 1861.

They therein base their right to recover against the city, substantially, on the following grounds:

1. That they were on or about the 29th day of March 1859, the owners of a steamboat called the Huron, which was duly licensed and enrolled at the Port of Chicago, and was used in

navigating the lakes and the rivers connecting them:

2. That the Chicago river was and is a navigable river:

3. That by virtue of the act of the Legislature of the State of Illinois, the defendant was possessed of the exclusive jurisdiction and control of said river, and was authorized and empowered to remove and prevent obstructions, to widen, straighten and deepen the same, and to collect such taxes and pass such ordinances as might be necessary to carry into effect the powers granted.

4. That the city accepted said legislative powers, and have ever since assumed and exercised the said powers and the management and control of the river, and levied and collected taxes and passed the necessary ordinances to carry into effect the said powers:

5. That by virtue of the premises it became and was the duty of the defendant to remove all obstructions in said river.

6. That about the 1st day of Nov., 1856, the schooner Mc Kay, or James McKay was sunk in said river, near the mouth: That the city assumed the exclusive right to remove the same, as it was its duty to do, but failed in its attempt so to do, only loosening it and then negligently and carelessly left the said wreck for a long time to wit: until about the 29th of March 1857: That by reason of the premises and the action of the winds and currents, the said wreck drifted further into the channel.

7. That on or about the 29th day of March aforesaid, the said wreck being entirely under water, and the owners and

master of the Huron being ignorant of its locality, run the said steamer on or against said wreck, without any negligence or want of *skill* on their part, whereby the said steamer sustained great injury, damage &c.

See Record, pages 2, 3 *and* 4.

The appellee in its answer denies its liability, mainly for the following reasons:

1. Because the District Court had no jurisdiction of the matters contained in the libel, the same not being matters of admiralty, and maritime jurisdiction.

2. Because libellants are barred and precluded from having or maintaining their said libel, the same supposed grievances and causes of action in the said libel mentioned having been heretofore passed upon and adjudicated in an action at law, commenced by said libellants in the Circuit Court of Cook County, in the State of Illinois, at the October term of said Court, A. D. 1857, in which action judgment was rendered by said Court in favor of appellee, and said judgment was afterwards taken by appeal to the Supreme Court of the State of Illinois, and at the April term thereof A. D. 1858, duly affirmed and the same still remains in full force and effect.

3. Because the appellee was under no obligation to remove said wreck and was guilty of no negligence in not doing it.

I.

Taking these several defences in their order, let us first inquire whether the matters contained in the libel are matters

of admiralty and maritime jurisdiction as against the appellee.

It seems to me that the true way to determine that question, is by putting another: Could such jurisdiction have been maintained in the absence of all legislation by the State of Illinois and the Common Council of the city of Chicago, in relation to the Chicago river and harbor? The answer must be in the negative. It will not do to say that the injury complained of is in the nature of a collision or marine tort and that admiralty has jurisdiction in such cases. Concede all that, and yet the question recurs; does the fact that admiralty has jurisdiction over the subject matter, give it jurisdiction of the person, or as in this case, the corporation? Clearly not. No principle of admiralty law can give that jurisdiction as against the city. The defendant by no rule or principle of maritime law that I have seen or heard of, could by any possibility be made liable for a *nonfeasance* of the kind predicated in the libel.

But it may be said that *locality* is the test established by this Court, to give jurisdiction, and that as the injury to the Huron happened on the navigable waters within the admiralty and maritime jurisdiction of the U. S. that therefore the case is cognizable in admiralty.

This, however, does not help the case, for still without local legislation, the city cannot be held liable. Its liability is predicated on a duty imposed, not by the common law of the sea, but by local statutes, and its neglect to perform or discharge that duty. The cause of action, therefore, as against the city, was created by the statutes of Illinois, and without them admiralty would have no jurisdiction.

It is true that some of the District Courts of the United States have undertaken, when the subject matter of the suit or the cause of action is of a maritime nature or character, to enforce liens created by local law.

But this Court in the case of *The People's Ferry Co., of Boston, vs. Beers et al* uses this language: "Thus far, however, no case of the kind has been sanctioned by this Court." 20 *How.* 402. While this is not a decision overruling such action of the district Courts, it may be regarded, I think, as a strong intimation of the opinion of the Court against it.

Moreover, there is no better estabilised rule than that State laws can not confer jurisdiction on the Courts of the United States.

Orleans vs. Phœbus, 11 Pets. 183.
The Steamer St. Laurence, 1 Black, 527.

It is replied, however, that the jurisdiction in this case is settled by the case of *The Phila. Wilm. & Balt. R. R. Co., vs. The Havre de Grace Steamer Tow Boat Co.* 23 *How.* 209.

In that case the appellants (The R. R. Co.) entered into an agreement with certain contractors to prepare the foundation and erect piers for building a bridge across the Susquehanna. In pursuance thereof, they drove piles into the channel of the river under the directions of the engineers, employed by the appellants.

Before the completion of the contract, the appellants

abandoned their purpose and discharged the contractors.

During the progress of the work the contractors had driven certain piles, called sight piles, in the channel of the river, which were not removed &c., but were cut off a few feet under the surface of the water, so they became a hidden and dangerous nuisance.

Upon these piles a vessel of the Tow Boat Co., run and was injured, when it commenced proceedings in admirality, against the Rail Road Co.

The learned Judge in delivering the opinion of the Court uses this language: "The appellant's contend they are not liable for the negligence which caused the injury, because the piles were not placed in the channel by their servants, but by those of the contractors, and the case was not altered by the fact, that the contractors were directed so to do by their engineers.

If the contractors had proceeded to complete their contract and left the piles in the condition complained of, this defence to the action *might have availed the appellants.* But as the driving of the piles for the legitimate purpose of the erection, was by authority of the law, and in pursuance of the contract, the contractors had done no wrong in placing them there. The nuisance was the result of the negligence *in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water.* This the contractors were bound to do, after the piles had served their legitimate purpose, and after they had completed the contract. But before this, the Rail Road Co., determined to discontinue the

erection of the bridge—they dismissed the contractors from the further fulfillment of their contract. Under such circumstances, it became the duty of the appellants to take care that all obstructions to the navigation which had been placed in the channel by *their orders* and for the purpose of *their* intended erection, should be removed."

The liability of the rail road company in this case, it will be observed, was held by the Court, to arise from the fact that the piles were placed in the channel of the river by *their orders* and for their use and benefit. In other words, these piles were placed there by their direction and left by them in such a condition as to be a nuisance. They were in fact and law, the authors of a nuisance.

It was not a nonfeasance but a misfeasance. And therein is the difference between that case and the one at bar. It is true, the libel attempts to avoid this distinction by alleging that the efforts made by the harbor master loosened the wreck, thereby causing it to shift its position nearer the center of the channel of the river. But the testimony of libellant's own witnesses, Ingles and Prindiville, the only ones who knew anything about that matter, is that the attempts made to move the hulk by the former did not loosen it in its bed or change its position.

See Record, pages 17 *and* 21.

And Prindeville says (page 21 of record) that they did not leave the wreck in any more dangerous condition than they found it, and that the efforts made in attempting to remove it, did not, in his opinion, contribute in any degree to the subsequent change in its position.

So that if the city is liable at at all, it must be for *nonfeasance*, and that too for the non-performance of a duty imposed by local law.

Hence, it seems clear that the case in 23. Howard is not authority in this case on the question of jurisdiction.

Sufficient, however, for the purposes of this defence, to say, that blot out the local legislation of the State, and this action cannot be maintained against the city.

II.

Is the judgment of the State Court between the same parties, for precisely the same cause of action, a bar to the maintainance of this suit in admiralty?

The liability of the city in admiralty is and must be predicated on the ground that the injury received by the Huron, was or was in the nature of a *marine tort.*

The question then arises, whether the jurisdiction of Courts of admiralty, in such cases, is exclusive, or concurrent.

That it is concurrent, is established, both by this Court and the Courts of several of the States, in numerous cases, of which I cite the following:

Ingrahan vs. Dawson, 20 How. 486.
Taylor et al vs. Carryl, 20 *Ibid.* 583—598.
Maguire vs. Card, 21 Ibid. 248—250.
The Globe, 2 Blatch. 428—435.
Percival vs. Hickey, 18 Johns. 257—290.

The jurisdiction being concurrent, then the adjudication in the State Court is conclusive, the parties and the cause of action being the same.

The authorities on this point are numerous, and the attention of the Court is only called to the following:

Hopkins vs. Lee;	6 Wheat. 109, 113
Smith vs. McIver;	9. Ibid, 535.
Bank of U. S. vs. Beverly;	1. How. 134, 148.
Washington Bridge Co. vs. Stewart;	3. How. 413.
Kitchen, et al. vs. Campbell:	3 Wils. 308.

Nor does it make any difference, should the defeated party resort to a different writ or remedy. He cannot reagitate a settled controversy by modifying the form of his action.

Hutchins vs. Campbell, 2 Black 831.

Nor whether the defence is set up at law or equity, or by plea or given in evidence, where it is receivable, without being specially pleaded. Still it is conclusive between the same parties and their privies and this, without regard to the variant forms of action or modes of proceeding, which may be adopted as a means of litigating the *points* in issue.

Cist et al vs. Zeigler, 16 Serg. and Rawle 285.

Darlington vs. Grey 5 Whart. 489.

Souter vs. Baymore, 7 Burr. 417.

Nor will a court of equity review the decision of a Court of law, even though it has concurrent jurisdiction.

Abrams et alm Camp, 3 Scam. 291.
Thompson vs. Berry, 3 Johns Chanc'y R. 398.
Bartholomew vs. Yaw, 9. Paige 166.
Hempstead et al vs. Conway, 1 Eng. 317.
Marine Ins. Co., vs. Hodgson, 7 Cranch 346.
Brown vs. Snow, 10 Peters 504.

Again, the judgment or decree of a Court of competent jurisdiction is not only final as to the subject matter thereby determined, but also as to every other matter which the parties might have litigated and had decided.

The only cases which form exceptions, to this general rule, are the case of mutual dealings between parties, where the defendant omits to set off his counter demand, and may still recover in a cross action; and the case of an ejectment in which the defendant neglecting to bring forward his title, is not precluded by the recovery against him, from availing himself of it in a subsequent suit. And this rule is equally applicable to a Court of chancery, and it seems to me, to a court of admirality as well, or to any other court.

Le Guen vs. Gouverneur;	1 Johns. *cases* 436.
Smith vs. Whiting;	17 Mass. 445.
Marsh vs. Pier;	4 Rawle, 284.
Hayden vs. Booth;	2 A. K. Marsh. 354.
Fischli vs. Fischli;	1 Blackf. 360.

Nor is the doctrine of *res-adjudicata* confined or limited to cases where the parties and the subject matter are the same in the second or subsequent action.

The correct rule being, that whenever *the point or question in issue* has been once litigated and determined by a judg-

ment or decree of a competent Court, it is a bar to all subsequent suits involving the same point or question.'

In the case of *Doty vs. Brown*, 4 Comst. 73. the Court of Appeals say: "The plaintiff, Doty insists, however, that the former judgment bywhich the bill of sale from Sisson to him was adjudged to be fraudulent, is not conclusive against him on that point in this case, because the goods for which this suit is brought, are not the same goods for which the former recovery was had, and that the two suits not being for the same subject matter, the whole question as to the title to the goods now in controversy, is open and unaffected by the former decision.

But the settled principle of law appears to be, that the same point or question, when once litigated and settled by a verdict and judgment thereon, shall not again be contested in any subsequent controversy between the same parties depending on that point or question."

The learned judge, delivering the opinion of the Court, in reviewing the cases of *Gardner vs. Buckle;* 3 Cow. 120; *Bent vs. Steinberger;* 4 Cow. 559; *Bochaud vs. Dias;* 3 Denio, 238 and *Outram vs. Morewood;* 3 East, 346. says: "In each of these cases, the cause of action in the second suit was different from the cause of action in the first, but the former determinations were held to be conclusive, because the *same question* was determined in the first suit on which the second defended."

Nor does the fact that the party has discovered new evidence, not in his power at former trial, form an exception to the rule at law or equity.

Kelhefer vs. Kerr; 17 *Serg. and Rawle,* 319.

Nor is the rule confined to cases where issues are joined and verdicts obtained on the merits.

Where the questions raised on demurrer go to the very cause of the action, the judgment or decree of the Court thereon is just as much a bar to any subsequent action, as a judgment on a verdict or a decree on a final hearing.

Story's Eq. Jur, Sec. 456.

In the case of *The City Bank of New Orleans vs. Waldron;* 1 *La. Ann.* 46. it was held that a decree dismissing a bill in Chancery rendered on a demurrer which embraced the merits of the case, would support a plea of *res adjudicata.*

It is also held in the following cases, that a judgment or a general demurrer to a declaration is a judgment on the merits and is conclusive in a subsequent suit where the parties and the cause of action are the same.

Perkins vs. Moore, 16 *Ala.* 17.

Robinson vs. Howard;	5 Calf. 428.
Bouchaud vs. Dias;	3 Denio 243.
Ferrer Case;	6 Coke, 7.
Kitchen vs. Campbell;	2 Blacks. Rp. 833.
Ferrer et al. vs. Arden;	2 Cro. Eliz. 668
7. *Bacon's Abridg.*	*Tit. Dem.* 4, *page* 665.
Gould on Plead;	477, 478.

These authorities settle, beyond cavil, the doctrine, that the judgment of a court of concurrent jurisdiction, whether on a verdict or a general demurrer in a court of law, and a decree in Equity whether on the hearing or on demurrer, conclusively bar a recovery in any subsequent suit between the same parties or their privies, where the same subject matter, or *point* or *question* is involved.

I do not think it necessary to discuss at any length the question whether the same rule obtains in admiralty. Notwithstanding the *dicta* of Dr. Lushington in the case of the *Ann and Mary;* 2 Wm. Robs. 189, to the contrary, there is no reason why the rule does not apply with as much force to courts of admiralty, as to any other.

In the case of *Taylor vs. The Royal Saxon*, 1 Wallace Jr. 333, it was held that the pendency of a replevin in a State Court to settle the right of property in a vessel is a bar to a libel in the admiralty to settle the same right between the same persons &c., &c.

His Honor, Judge Grier, in his opinion in that case says: "But it is denied that this is a case of concurrent jurisdiction, because of the different *form* and *course of proceedings* in a Court of admiralty. This proceeding it is said is *in rem* that all the world is a party, while the action of replevin is a mere personal action of trespass; that in the one case, the thing passes into possession of the court; in the other, the delivery is made by the officer without any order or judgment of the Court.

These distinctions though ingenious, do not constitute a difference or furnish an argument to justify the court of ad-

charge the duties imposed, and for that purpose levied and collected taxes and controlled and regulated the said river and harbor and that by means thereof and by the said State statute it became and was its duty to remove and prevent all obstructions therein.

3. They aver in their declaration, (*Record, page* 35) as in their libel, (*Record, page* 3) that the city undertook and entered upon the discharge of its duties and obligations by the passage of necessary ordinances, rules and regulations authorized by the act of 1851, whereby it became and was its duty to remove all obstructions &c.

4. They aver in their declaration (*Record, page* 36) as in their libel (*Record, pages* 3 and 4) that the Chicago river and harbor is a public highway and navigable stream, and that the city not regarding its duty in the premises on the 29th of March 1857, and for five months prior thereto negligently and carelessly suffered and permitted an obstruction to remain in said river or harbor, to-wit: the hulk or wreck of the schooner McKay or James McKay, and that said city although knowing that the same was under water and out of sight, neglected to place any buoy or signal thereon to indicate its locality.

5. They also aver in the declaration, (*Record, page* 37) as in the libel, (*Record, page* 4) that by reason of the premises that on or about the 29th day of March 1857, the steamboat Huron (owned by the appellants) in passing through said Chicago river and near its mouth, was accidentally and without any fault or negligence or any want of care and skill on the part of the owners or those in charge of the steamer, run on

to or against the said hulk of the McKay.

It is true that in the printed record, the happening of the accident is stated to be in the declaration, on the 29th day of March 1857, while in the libel it is stated to be the 29th of March 1859. But the evidence of libellants in the District Court fixes the date about the 29th day of March 1857. (See testimony of the captain of the Huron, record, page 10; of Ingles, pages 14 and 15; and of the mate, page 18.)

So that the date fixed in the libel is evidently a mistake and there can be no question but the accident occurred in the last of March 1857.

There can be no doubt from this brief recital, of the allegations in the declaration and the libel, that the parties and subject matter of both actions are the same.

They are both actions to recover damages sustained by reason of an alleged obstruction in the Chicago river. The parties are the same—the vessel (the Huron) injured is the same—the time and cause of injury are the same—the liability of the city is placed on the same ground in both actions, to-wit: a duty imposed in both cases by the same act of the Legislature, and the same ordinances of the city, and the neglect to perform or discharge it.

Nothing in the libel or in the facts in the case, changes the cause of action from what it was in the State Courts. The liability of the city is based on its *non-feasance* in both courts and the Supreme Court of Illinois at its April term 1858, ex-

pressly decide the very identical *questions* raised in the cas at bar against the appellants—*Goodrich et al, vs. City of Chicago*, 20 *Ills.* 445.

It is not a question that can be raised here, whether that decision was right or wrong. Sufficient to say, that the parties appellant *selected* that tribunal to litigate their supposed rights or grievances, and they must be content with the result. If a party, when defeated in one tribunal is permitted to take his chances in another, there can be no end to litigation. For if defeated in the second, he may in like manner resort to a third, and so run the gauntlet of all the courts of the country. No court has ever yet countenanced such a course, and I trust none will ever be found. Litigation is harrasing and vexatious enough to parties at best, but break down and destroy the doctrine of *res-adjudicata*, and it would be intolerable.

III.

The remaining question is, whether the city was under any legal obligation to remove said wreck?

It is not contended that the city had any part in putting it in the channel of the river, or that it was in any way interested in the schooner McKay. If there is any liability on the part of the city, it arises from a duty imposed, by local laws, and a neglect to perform that duty.

It is true that by the act of 1851, the power was conferred, among other things, to remove obstructions in the river.

The question arises whether the exercise of that power was discretionary or not. Does the word "power," as used in that act, import or signify duty or obligation? If it does, the sooner the city procures the repeal of that statute, the better. For it imposes, if that be the construction, an obligation which the municipal corporation of Chicago can never discharge, without taxing its people, beyond human endurance. The harbor extends a mile into Lake Michigan on the entire east front of the city—a distance of over eight miles. The river and its branches are navigable for a distance of eight miles and more. Within these bounds are sand bars, snags and obstructions, that would cost millions of money to remove. If the city is bound to remove any of these obstructions, except as it may elect and is able to do, it is bound to remove them all. Such was not the intent and object of the Legislature in granting these powers.

The Supreme Court of the State of Illinois, when this same case was before them (20 Ill's 447) say: "By the city charter of Chicago, authority is conferred upon the city to remove obstructions from, and to widen, deepen and straighten the harbor of Chicago; and that harbor is declared to embrace the Chicago river and its branches to their sources, and to extend one mile into the lake. This action is brought for neglecting to exercise the authority here conferred, to remove the hulk of a sunken vessel, near the mouth of the harbor, by reason whereof the plaintiffs had sustained damage. To maintain this action, we must hold that the city is bound to exercise all the authority here conferred, and to do all the acts here authorized. Such, we are satisfied was not the intention of the Legislature. If they were liable to one party for the damage he has sustained by reason of their hav-

ing neglected to do one of the acts authorized, they are equally liable to another, for the damages he has sustained, because they omitted to do another of these acts; and so they must do all that is here authorized, or be answerable for all the damages suffered by the omission. The Courts cannot discriminate and say, you shall remove this wreck, but you need not remove that sand bar, or deepen the river in another place, or straighten it in another."

There we have the solemn and unaminous decision of the Supreme Court of the State of Illinois, that there is no liability on the part of the city, under and by virtue of the local or State Laws, to the appellants, for any damages sustained by their Steamer, running on, or against the hulk of the Schooner. This decision was made at the April term 1858, and has remained the settled construction put on the statute by that Court, and has ever since been acquiesced in by the bar of the State. No attempt has ever been made to procure a review of it by that Court.

This construction, has, therefore, become a part of the Statute law of the state, and is as binding on this Court as the Statute itself, or as if enacted by the legislature. In the case of *Elmendorf vs. Taylor*, 10 Wheat. 159, Chief Just. Marshall, in delivering the opinion of the Court says: "This Court has uniformly professed its disposition, in cases depending on the laws of a particular State to adopt the construction, which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, when such department exists,

is the appropriate organ for construing the Legislative acts of that government. Thus, no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the Courts of Great Britain or of France or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation, as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this Court to the constitution and laws of the United States, is received by all as the true construction; and on the same principle, the construction given by the Courts of the several States to the Legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States."

Again, this Court in the case of *Green vs. Lessees of Neal*, 7 Peters 297, say: "On all questions arising under the constitution and laws of the Union, this Court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, State as well as Federal. A State tribunal has a right to examine any such questions and to determine them, but its decisions must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different when a question arises under a local law. The decision of this question, by the highest judicial tribunal of a State, should be considered as final by this Court; not because the State tribunal, in such case, has any power to bind this Court, but because in the language of the Court, in the case of

Shelby et al vs. Guy. 11 Wheat. 361 a fixed and received construction by a State in its own Courts, makes a part of the statute laws."

* * * * *

"The exposition forms a part of the local law, and is binding on all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State; which the Federal Court while sitting within the State, and this Court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

If the construction of the highest judicial tribunal of a State forms part of its statute law, as much as an enactment by the legislature, how can this Court make a distinction between them?"

But it is said, that although the Supreme Court of the State of Illinois, has decided, that the power conferred in relation to the removal of obstructions, is discretionary, that such discretion is lodged in the Common Council of said city and that, that body has exercised such discretion by the passage of the ordinances found on pages 44, 45, 46 and 47 of the Record.

Admitting, for the sake of the argument, this to be so, still it does not relieve this case from the bar of the former recovery, nor from the doctrine that "a fixed and received construction by a State in its own Courts, makes

a part of the statute law."

For in the first count of the declaration of appellants (page 35 of Record) they aver that the city has passed such ordinances and in the second count (page 36) they aver that the Common Council of the city, did on the 20th day of May 1856, pass an ordinance for the removal, without delay, of any obstruction to the free navigation of said Chicago river or harbor, and set out a portion of said ordinance, being a portion of the same contained in the record, between pages 44 and 47.

So it will be perceived that the ordinances of the city, as well as the act of the Legislature under which they were made, were before the Supreme Court of the State, and the decision of the State Court was upon the whole subject. The record in that case embraced all the questions that are contained in this one. That court passed upon them—it is the settled construction of that court—has been acquiesced in for years, and is binding upon this court as a part of the local and statutory law of that State.

S. A. IRVIN,
Proctor for Appellee.